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In The

Supreme Court of the United States

October Term, 1970

No. 652

FLORIDA POWER CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Florida Power Corporation, Respondent and Cross-Petitioner, cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (A. 1a-14a) is reported at 425 F. 2d 1196. The opinions of the Federal Power Commission (A. 15a-46a) are reported at 40 FPC

1227 and 41 FPC 4. The opinion of the hearing examiner (A. 47a-70a) is reported at 40 FPC 1248.

JURISDICTION

The judgment of the Court of Appeals (A. 14a) was entered on May 1, 1970, and modified on June 17, 1970. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act (16 U.S.C. 8251(b)). A Cross-Petition conditioned upon the Court's grant of certiorari with respect to the original petition need not be filed within the time limits applicable to the initial petition. *Brotherhood of Ry. & S.S. Clerks v. Florida East Coast R. Co.*, 382 U.S. 1008, 384 U.S. 238, 243; *Pierson v. Ray*, 384 U.S. 938, 386 U.S. 547, 551; Stern & Gressman, *Supreme Court Practice*, 311-12 (4th ed. 1969).

QUESTION PRESENTED

Whether the Federal Power Commission is empowered to and should prescribe, as a term and condition of an interconnection order as to electric utilities, some protection against competition that will be created or increased as a result of the interconnection, when such competition adversely affects the interest of the public and the utilities.

STATUTE INVOLVED

Section 202 of the Federal Power Act, 16 U.S.C. 824*a*, provides in part:

> "(a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public

interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. . . .

(b) Sale or exchange of energy; establishing physical connections.

"Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided,* That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them."

STATEMENT

Since 1927, Florida Power Corporation has provided electric service in a rural area southwest and west of the City of Gainesville in Alachua County, Florida. This area began to develop in the late fifties and a portion is now suburban. Additionally, Florida Power has served the University of

Florida, located at Gainesville, since 1948, when Gainesville declined to continue serving the University. Florida Power's investment in facilities that serve the University now totals approximately one-half million dollars, exclusive of the cost of generation and transmission facilities. Florida Power also provides wholesale power to Clay Electric Cooperative, a rural electric cooperative that sells electricity at retail in rural and suburban Gainesville. Florida Power has a direct capital investment of some $1,900,000.00 in the Gainesville area.

In 1965, the City of Gainesville approached Florida Power Corporation concerning the possibility of an interconnection between their electric systems. Florida Power agreed to interconnect but sought to resolve a pending controversy over retail territorial service areas resulting from Gainesville's duplication of Florida Power's existing facilities and service in the western environs of Gainesville.[1] This was thought by Florida Power to be a necessary component of any interconnection arrangement with Gainesville because of various practices by Gainesville that were admittedly directed at the ultimate elimination of Florida Power as a retail supplier in the area.

Gainesville possesses a complete monopoly over electric sales within the city limits.[2] In 1960, Gainesville launched an intensive campaign to become the sole retail supplier of electric power in the entire area. In order to expand its electric service to areas of Alachua County long served by Florida Power or Clay Electric, Gainesville installed distribution lines duplicating and paralleling existing lines. Within six years, over 35 miles of duplicate lines had been constructed by the City, and the practice is continuing.

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[1] Florida Power sought to resolve this issue by seeking to negotiate a proposed territorial agreement establishing service areas within which each utility would serve at retail. The proposed agreement was to be submitted to and ruled upon by the Florida Public Service Commission, which has long entered territorial orders establishing service areas for the purpose of eliminating duplication of electric facilities and service. The Florida Commission is the state agency regulating Florida Power, but it lacks jurisdiction over Gainesville's municipal system. Its practices and policies as to service areas are discussed at 14-17, *infra.*

[2] Twenty-two customers who were served by Florida Power prior to annexation in the city limits in 1962 are still served by it. Florida

At the same time that Gainesville was extending its electric distribution lines, it was rigidly applying a "package" or "tie-in" policy respecting its water, sewer, and electric service. Under this policy, a person may not purchase or continue to purchase water and sewer service from Gainesville unless City electric service is also purchased. Residents of Alachua County are required by law to purchase water and sewer service if available. Gainesville owns and operates the only water and sewer systems in the area. Hence, as Gainesville extended its power lines, it automatically obtained all electric customers within the expanded service area because those customers were forced to continue taking water and sewer service from the City.

As a result, Gainesville soon became the dominant electric supplier in the area.[3] It was avowedly seeking to become the sole supplier in the area at the time it sought an interconnection with Florida Power. Such an interconnection would be of little or no benefit to Florida Power but would place considerable responsibility upon its system. On the other hand, interconnection would provide Gainesville with substantial benefits by virtue of Florida Power's costly generating and transmission facilities, with no significant responsibilities upon Gainesville's own system.

Power has always agreed to transfer these customers to the City when service areas are resolved.

[3] Gainesville's dominance in the area is emphasized in its Petition for Certiorari at page 19.

The benefits inuring to Gainesville from an interconnection will further enhance its competitive capability to the detriment of Florida Power.

Florida Power was at all times willing to interconnect with Gainesville on a voluntary basis. However, it was not willing to deliberately assist its aggressive competitor without assurance, through the establishment of reasonable service areas, that Gainesville would not use the benefits flowing to it from interconnection to eliminate Florida Power as a retail supplier in the area.

Gainesville and Florida Power could not reach agreement on the question of service areas. In late 1965, Gainesville filed formal proceedings with the Federal Power Commission requesting an order of interconnection.

The Presiding Examiner for the Federal Power Commission ordered the parties to interconnect. As a condition of the interconnection arrangement, the parties were required to reach an agreement as to retail service areas in order to eliminate and avoid duplication of facilities.

The Examiner preliminarily declared that direct competition between electric utilities resulting in duplication of plant and facilities is an "uneconomic and wasteful practice" that is "contrary to the public interest. . . ." (A. 58a). Noting that the Gainesville electric system is not regulated at either the state or federal level, the Examiner stated:

> "From Gainesville's unequivocally stated intention to expand its electrical system and extend its distribution lines without regard to existing facilities, it follows that issuance of an unqualified order by the Commission directing the interconnection will inevitably result in the further uneconomic duplication of facilities, a situation long recognized as inimical to the public interest. *Such an order, moreover, would*

> *put Florida Power in the anomalous position where it will be furnishing the means for Gainesville to compete against it more effectively within its own assigned service territory. Under these circumstances Florida Power would be contributing to its own economic erosion because of the adverse effect of such increased competition on its capital investment in the area.*" (A. 59a-60a).[4]

The Examiner concluded that the interconnection should not be ordered "in a vacuum without regard for the consequences," as Gainesville urged. (A. 59a).

The Federal Power Commission reversed on this point. It did not quarrel with the Examiner's finding that elimination of Gainesville's duplication of facilities was required by the public interest. Nor did it reject his finding that interconnection would enable Gainesville to compete *more effectively* against Florida Power. However, the Commission feared that "the intransigence of the parties" in resolving the territorial issue might prevent consummation of the interconnection. (A. 32a). The Commission therefore refused to approve the Examiner's condition, and contented itself instead with the hope that Gainesville would eventually eliminate its wasteful duplication voluntarily.

The Fifth Circuit Court of Appeals affirmed this holding of the Commission in a footnote, observing only that "the question of duplication of facilities is not directly related to this case . . .". (A. 1a, n. 1).

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[4] All emphasis in quoted material is supplied unless otherwise stated.

REASONS FOR GRANTING THE WRIT

1. THE HOLDING BELOW IMPAIRS THE FEDERAL POWER COMMISSION'S STATUTORY DUTY TO ENCOURAGE ELECTRIC UTILITY INTERCONNECTIONS AND JEOPARDIZES THE EFFECTIVE OPERATION AND COORDINATION OF INTERCONNECTED SYSTEMS.

There is a substantial public need for electric utility interconnections in order to assure adequate and reliable service for this Nation's ever-increasing power demands. Under section 202(a) of the Federal Power Act, Congress imposed a statutory *duty* upon the Federal Power Commission to encourage *voluntary* interconnections upon reasonable terms to meet this need. The Commission is empowered by section 202(b) to compel interconnections under certain circumstances.

The interconnected operations of electric utilities is unique to American industry. In no other commercial enterprise does a profit-seeking company dedicate its investment and efforts to assure that another company will be able to adequately and reliably serve its customers. Such cooperation and coordination are incompatible with cut-throat competition between two directly interconnected utilities.

This fact was fully appreciated by Congress in enacting the interconnection provisions of the Federal Power Act. The legislative history of the Act establishes that a primary Congressional purpose was elimination of "the evils that accompany rivalries and jeolousies between systems in a field where competition has long been abandoned as a method of control. . . ."[5]

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[5] *Hearings on S. 1725 before the Senate Comm. on Interstate Commerce,* 74th Cong., 1st Sess., at 246 (1935); *Hearings on H.R. 5423 before the House Comm. on Interstate and Foreign Commerce,* 74th Cong., 1st Sess., at 385 (1935).

The legislative history further demonstrates that Congress did not intend the Power Commission's statutory power to order interconnection to be utilized to create or increase competition between the interconnected companies. Mr. DeVane, then solicitor for the Federal Power Commission and one of the authors of this legislation, declared that the Act was "not drawn upon the theory that competition shall be established in the industry," and that "there is nothing in this bill . . . that provides for competition."[6] In response to a hypothetical question, Mr. DeVane stated categorically that "there is nothing in this bill that permits one utility to enter another utility's field and in doing so to require the other utility to transport its power for the purpose."[7]

The undesirability of unbridled competition between directly interconnected electric companies is similarly recognized today. As noted by the then Chairman of the Power Commission, if system reliability is to be increased, the trend toward stronger interconnections must be accelerated and systems must coordinate their planning and operation even more closely.[8] Describing coordination as "the *sine qua non* of modern power systems operation," he went on to say that this "requires extensive intersystem planning and joint agreements between the interconnected systems."[9]

In brief, interconnection, to be truly effective, requires more than a physical tie between two electric systems. It requires a desire and a willingness to fully cooperate in implementing interconnected operations. This cannot exist in an atmosphere of aggressive competition between the companies. Further, it is unlikely that a profit-seeking utility will voluntarily agree in the first instance to interconnect and thereby assist another utility in competing more effectively against it for the same customers.

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[6] *Hearings on H.R. 5423 before the House Comm. on Interstate and Foreign Commerce,* 74th Cong., 1st Sess., at 554-558 (1935).

[7] *Id.* at 554.

[8] *Hearings on S. 3136 before the Senate Comm. on Commerce,* 89th Cong., 2d Sess., at 21 (1966).

[9] *Id.*

The common desire of electric utilities to have some protection against increased competition that may result from interconnection with a neighboring utility is often met by observing territorial service area boundaries.[10] However, in the absence of such a solution, the question of territorial integrity of utilities can be a serious deterrent to their voluntary interconnection.

This point was fully considered in the *National Power Survey*, a comprehensive report on the utility industry prepared by the Federal Power Commission and its staff in 1964. It was declared therein that:

> "When systems from different segments of the industry attempt to organize a pool, however, all such systems may want to reach one or more formal agreements which have the effect of eliminating competition for loads. This is particularly the case wherever there is the possibility that a participant who is also a competitor may use the advantages derived from a pooling arrangement to undercut and take over the present or potential customers of one or more other participants. *In such circumstances, there will necessarily be a hesitancy to enter into such a pooling arrangement unless there is assurance that it will not worsen established competitive positions.*"[11]

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[10] Service areas for electric utilities are universally held to advance the public interest because they eliminate wasteful and unesthetic duplication of facilities. Such service areas are generally regulated by the appropriate state or federal agency. This point is fully discussed at pages 14-17 hereinafter.

[11] FED. POWER COMM., *National Power Survey,* Pt. II, at 367 [1964].

The Commission went on to state that, "*if the participants have different costs and are subject to different regulation, the need for such assurance is clear.*"[12] In such a case,[13] the Commission concluded, the feasibility of the interconnection arrangement may be especially dependent on the assurances that can be given with respect to areas to be served.

During Congressional hearings in 1966, the Power Commission, through its Chairman, emphasized that inability to assure territorial protection may hamper voluntary interconnections that are in the public interest.[14] Referring specifically to territorial agreements, it was stated that "if anything like the present industry structure is to be maintained — and we believe there are compelling reasons to do so — it is clear that complex arrangements will have to be worked out. . . ."[15]

Clearly the Commission acknowledges the importance of territorial protection to the encouragement and continuation of a strong, effective interconnected network of electric utilities. Yet it refused to come to grips with the issue when raised in a regulatory proceeding of first impression. Its failure to deal firmly and effectively with this problem will have far-reaching ramifications.

As previously noted, it is unreasonable to expect that any utility will seek to voluntarily aid a competing utility by providing the very substantial benefits of interconnection when those benefits will be turned back against it through aggressive competition. If the benefits of an interconnection accrued equally to both utilities, so that their competitive situation would not be worsened by the interconnection, there would, of course, be no problem. As a practical matter this does not happen. In the instant case, for example, both the Presiding Examiner and the Court of Appeals held that *the interconnection will be of substantial benefit only to Gainesville, although it will impose a substantial responsibility upon the system of Florida Power*. (A. 12a-13a, 54a-55a, 62a-63a).

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[12] *Id.*

[13] This is precisely the situation here. Gainesville, as a municipal system, has much lower costs than Florida Power because it is not subject to state or federal taxation and because of its financing advantages. And, unlike Florida Power, Gainesville is not regulated at either the state or federal level.

[14] *Hearings on S. 3136 before the Senate Comm. on Commerce*, 89th Cong., 2d Sess., at 32 (1966).

[15] *Id.* at 22.

Utilities that might otherwise be willing to negotiate reasonable service area agreements as part of an interconnection arrangement will now be reluctant to do so in light of the ambivalent approach of the Power Commission herein, coupled with the specter of antitrust suits. Conversely, now that the Commission has demonstrated its willingness to order interconnection without regard to resultant economic consequences, there is a very real danger that aggressive, dominant utilities, such as Gainesville, will seek an ordered interconnection from the Commission rather than attempt to negotiate a voluntary interconnection within the framework of common industry practice. Such a result is undesirable for at least four reasons.

First, as the Commission itself predicted the electric power industry will inevitably become more concentrated and less diverse when this occurs.[16] Such a revision of the current industry structure should be accomplished by

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[16] *Supra*, n. 15.

Congressional action only and not as a by-product of the Commission's administrative practices.

Second, this result will greatly hinder the ability and efforts of the Power Commission to perform its statutory duty of encouraging voluntary interconnection and coordinated operations and planning. The program of interconnection and coordination of electric utilities will be correspondingly retarded at the very time it is most urgently required.

Third, although the Commission can always order an interconnection, it cannot effectively assure the correlative coordination and cooperation between the affected utilities.

Finally, formal Commission proceedings require considerable time. The instant case has now been pending for over five years, during which time Gainesville operated in isolation. If the Power Commission had provided firm standards in its decision herein, other utilities could have been guided thereby, obviating the necessity of future proceedings.

The Federal Power Commission seeks a writ of certiorari herein. It asserts that the decision of the Court of Appeals threatens "serious impairment of the Commission's efforts to encourage voluntary interconnection." (FPC Petition at 10). It further argues that the decision requires the Commission to adopt as a term of interconnection something that is not "consistent with industry practice." (FPC Petition at 14). Yet, by its own admission, refusal to assure territorial protection against the consequences of interconnection threatens serious impairment of its efforts to encourage voluntary interconnection and to assure effective interconnection arrangements. Again, it required an interconnection herein upon terms and conditions which are inconsistent with industry practice. It is respectfully submitted that this Cross-Petition should accordingly be granted if the Court grants the Petition.

2. UNDER SECTION 202(b) OF THE FEDERAL POWER ACT, THE FEDERAL POWER COMMISSION IS REQUIRED TO PROVIDE TERMS AND CONDITIONS OF INTERCONNECTION THAT PROTECT THE AFFECTED UTILITIES AND PUBLIC FROM HARMFUL CONSEQUENCES OF THE INTERCONNECTION.

Pursuant to section 202(b) of the Federal Power Act, the Federal Power Commission ordered Florida Power to interconnect with Gainesville. Under that section, the Commission is directed to order interconnection in the "public interest" and to "prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order. . . ."

The Commission should have prescribed, as a term or condition of the interconnection arrangement ordered herein, the elimination of Gainesville's duplication of electric facilities and service. By omitting a provision such as the Presiding Examiner required, the Commission failed to guard the public interest as to *all* the consequences of the interconnection. Moreover, it failed to alleviate the adverse economic effects that will be inflicted upon Florida Power as a direct result of the ordered interconnection. Accordingly, the Commission failed to perform its statutory duties under the Federal Power Act.

Both Federal and Florida regulatory agencies have long held that duplication of electric facilities adversely affects the public. This is so for three basic reasons.

First, electric service requires an enormous plant investment per dollar of revenue.[17] Duplication of that investment can only result in pure economic waste. As stated by the Florida Public Service Commission:

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[17] In terms of the dollar value of plant and equipment, the electric power industry is by far the Nation's largest. FED. POWER COMM., *National Power Survey,* Pt. I, at 11.

> "If two similar utilities enter the same territory and compete for the limited business of the area, each will have fewer customers, but there inevitably will be excess facilities which must earn a reasonable return. The rates in such a situation will be higher than the service is worth, or customers in more remote areas will bear some of the unjustified expense necessary to support such economic waste."[18]

It was similarly acknowledged in the *National Power Survey* that "the investment required for power supply is so great that no community can afford a number of competing systems each with the facilities to furnish electric service to the same customer."[19] Mr. White, then Chairman of the Power Commission, has flatly declared that "because of the heavy investment the electric power business requires, it is economically wasteful to duplicate local distribution facilities."[20]

Second, parallel electric lines present a substantial hazard to reliability of service, as well to the linemen who must maintain and repair the lines. For instance, the Presiding Examiner found that, in some areas, Gainesville had installed its poles and lines "within a very few feet" of the existing facilities, thereby creating "an obvious hazardous situation." (A. 56a).

Third, a surplusage of poles and wires is esthetically undesirable. This is patently apparent from a photograph of just one instance of Gainesville's duplication. (R. 2034; A. 72a). In a day and age when the environment is finally being accorded the respect that it deserves, this is not an insignificant factor.

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[18] Order No. 2948, Docket No. 6081 (1960).

[19] Fed. Power Comm., *National Power Survey*, Pt. I, at 11.

[20] *Hearings on S. 3136 before the Senate Comm. on Commerce*, 89th Cong., 2d Sess., at 13 (1966).

In mid-1966, the then Chairman of the Federal Power Commission summed the matter up as follows:

> "The basic reason for regulating these industries is that it just is not in the public interest to have duplicatory systems. We can't have two power systems competing in the same area, just as we have two drug stores or two department stores. *This is the underlying rationale for Federal Government or any government undertaking regulation."*[21]

In furtherance of this policy, the Federal Power Commission has frequently required the elimination of wasteful and uneconomic duplication of distribution facilities.[22] The Commission's power to require two utilities to honor respective service areas so as to avoid wasteful duplication has been sustained by this Court. *Pennsylvania Water Power Co. v. Federal Power Commission,* 343 U.S. 414 (1952).

The Florida Public Service Commission has similarly acted to prohibit such harmful duplication, declaring that:

> ". . . territorial agreements which will minimize, and perhaps even eliminate, unnecessary and uneconomical duplication of plant and facilities which invariably accompany expansions into areas already served by a competing utility, are definitely in the public interest and should be encouraged and approved by an agency such as this, which is charged with the duty of regulating public utilities in the public interest."[23]

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[21] *Id.* at 17.

[22] E.g., *Pacific Power & Light Co. and Hood River Electric Cooperative,* Docket No. E-7326 (1967); *Central Illinois Light Co.,* Docket No. E-7332 (1967).

[23] Order No. 2948, *supra,* n. 18.

Although the Florida Public Service Commission lacks jurisdiction over municipal electric systems, it can assign service areas to regulated utilities such as Florida Power. *City Gas Co. v. Peoples Gas System, Inc.*, 182 So. 2d 429 (Fla. 1965). Additionally, if a municipal utility and a regulated utility reach agreement as to service areas, the Florida Commission must rule upon the proposed agreement before it has any efficacy. *Storey v. Mayo,* 217 So. 2d 304 (Fla. 1968). A number of such orders have established service areas between municipal systems and regulated utilities.[24]

In the instant case every witness who testified on the matter acknowledged that Gainesville's construction of paralleling, duplicating electric distribution facilities is contrary to the public interest. Gainesville's witnesses Kelly, the Director of the Gainesville Utilities Department, and Professor Kammerer, the Director of the Public Administration Clearing Service of the University of Florida with experience in urban affairs, so testified. (R. 1259, 1273, 1533-4, 1550, 1554). Staff witness Braitman similarly testified. (R. 1416, 1420-1). Witnesses for Florida Power and Clay Electric agreed on this point. (R. 486-93, 706-18, 767-8, 843-6).

The only justification offered by Gainesville for its duplication of existing facilities is its representation that this was generally done in response to requests for service. However, as found by the Presiding Examiner:

> ". . . it is readily apparent from the record that such 'requests for service' were, and Gainesville readily

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[24] E.g., Order No. 2595, Docket No. 5256, City of Orlando and Florida Power Corporation (1957); Order No. 4193, Docket No. 8754, City of Lakeland and Tampa Electric Company (1967); Order No. 4285, Docket No. 9056, City of Homestead and Florida Power & Light Co. (1967).

> admits will continue to be, tinged with coercion in that those customers desiring Gainesville's water and sewage service were required to purchase the whole 'package' even though Gainesville's rates for the same electric service were higher than Florida Power's." (A. 56a-57a).

The Presiding Examiner found that Gainesville's "competition combined with duplication of plant and facilities" is "contrary to the public interest. . . ." (A. 58a). The Federal Power Commission did not dispute this finding. Accordingly, it should have acted to protect the public interest.

In addition, the Commission should have provided relief for Florida Power from the adverse economic effects that will flow to it as a direct result of the ordered interconnection with Gainesville.

The Gainesville area constitutes a growing community. In the normal course of events, Florida Power would share in that growth and attendant prosperity as a result of its long-standing and extensive investment in the area. However, Gainesville's professed intention of becoming the sole retail power supplier in the area, coupled with the benefits that will immediately accrue to Gainesville upon interconnection, spell the end of Florida Power as a retailer in this area.

As found by both the Presiding Examiner and the Court of Appeals, the benefits of the interconnection will flow *only* to Gainesville, *which will receive substantial and valuable benefits therefrom without incurring significant responsibilities.* (A. 13a). Gainesville estimates that interconnection will enable it to save well over $500,000 *per year* in investment and operating costs. On the other hand, as the Court of Appeals observed, the benefits to Florida

Power from the interconnection, if any, are largely illusory, although it will incur real substantial responsibilities. (A. 12a).

The benefits flowing to Gainesville from interconnection will unquestionably enable it to compete with Florida Power more effectively. Thus, as recognized by the Presiding Examiner, Florida Power will contribute "to its own economic erosion . . ." by interconnecting with Gainesville.

Although interconnection with Gainesville and the resulting loss of investment and business in this area will not bankrupt Florida Power, it will substantially and adversely affect it. More importantly, it is not simply Florida Power's investment in the Gainesville area that is at stake. Florida Power Corporation is interconnected, on a voluntary basis, with several municipal systems, and it is presently in the process of negotiating interconnections with still others. Interconnection on the same terms as the Commission's order herein is already being sought by some of these municipalities. The state-wide effect of this decision upon Florida Power, as well as other public utilities, is critical.

In view of the foregoing, the Federal Power Commission should have dealt unequivocally with the territorial dispute. Its reasons for not doing so lack substance. They certainly constitute sufficient grounds for disregarding the adverse consequences of the ordered interconnection.

The Commission predicated its inaction upon fear that the parties would not be able to voluntarily resolve their territorial controversy, thereby preventing consummation of the interconnection. This simply constitutes a failure of the Commission to utilize the statutory powers granted to it under the Federal Power Act.

There are many ways that the Federal Power Commission could have required resolution of the territorial controversy without jeopardizing the interconnection in the slightest. For example, it could have ordered the parties to interconnect immediately and simultaneously to negotiate the controversy, with the proviso that, failing a voluntary settlement, the dispute would be resolved by the Commission or a joint board.[25] By eliminating the necessity of voluntary agreement as a condition *precedent* to interconnection, and by providing means of resolving the issue in the absence of voluntary agreement, the stalemate foreseen by the Commission could be easily obviated.

In refusing to resolve the territorial issue, the Federal Power Commission stated that retail service areas are a matter of state rather than federal interest. Although this may be generally true, in the context of the instant case they are a matter of federal concern as well.

It is imperative to recognize that Florida Power did *not* request the Federal Power Commission *ab initio* to establish retail service areas. Gainesville initially sought an order of interconnection from the Commission. As a term of any order of interconnection, Florida Power sought a provision establishing service areas so as to reduce the adverse effects of this interconnection. In the context of an ordered interconnection arrangement, the federal interest resolving the service area issue is clear.

First, the pertinent legislative history reveals that a primary purpose of section 202 of the Federal Power Act was the elimination of "wasteful duplication of plant and services."[26] Commissioner Seavey of the Federal Power

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[25] See, pages 22-3, *infra.*

[26] *Hearings on S. 1725 before the Senate Comm. on Interstate Commerce,* 74th Cong., 1st Sess., at 246 (1935).

Commission noted that, by enactment of the interconnection provisions, "companies would gain strength and stability through the increased use of their facilities and the elimination of wasteful duplication of plant and services."[27] Further, as previously noted, the Power Commission has acknowledged that a fundamental rationale for federal utility regulation is that "it just is not in the public interest to have duplicatory systems."[28]

Second, the ability and desire of utilities to interconnect and to coordinate their operations for the purpose of effecting a strong interconnected system of electric utilities is a matter of great federal interest. Protection against adverse consequences of interconnected operations is directly related to utilities' willingness to do this.

Third, because Florida Power was ordered by the Power Commission to interconnect with Gainesville pursuant to *federal* regulation, matters that might otherwise have been of purely local concern automatically became matters of federal concern. It is axiomatic that "the power to regulate carries with it the power to protect utilities against indiscriminate competition, and should be exercised to that end." 73 C.J.S. *Public Utilities* § 12. As stated in *Brady Transfer & Storage Co. v. United States,* 80 F. Supp. 110, 118 (D. Iowa 1948), *aff'd,* 335 U.S. 875 (1948):

> "One of the underlying principles of regulation of utilities generally is that when the sovereignty assumes the power of regulation and requires the service and type of service which the regulatory authorities determine to be necessary and convenient in the public interest then some measure of protection against

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[27] *Hearings on H.R. 5423 before the House Comm. on Interstate and Foreign Commerce,* 74th Cong., 1st Sess., at 385 (1935).

[28] *Hearings on S. 3136 before the Senate Comm. on Commerce,* 89th Cong., 2d Sess., at 17 (1966).

> indiscriminate and uncontrolled competition *must* be provided."

Accordingly, Gainesville's unbridled competition with Florida Power became the concern of the Federal Power Commission as soon as an interconnection was directed by it.

The fact that Gainesville might have continued its duplication and tie-in practices even without an interconnection is no excuse for the Commission's failure to deal with the matter when presented to it. Once the Power Commission assumed jurisdiction over the parties to order an interconnection, it undertook the duty of exercising that jurisdiction fully and fairly. Florida Power should not have been required by the Power Commission to interconnect with Gainesville without some concomitant concern for its interest and that of the public.

As often happens, the instant case simply constitutes a situation where there is overlapping state and federal interest and regulation. As noted earlier, the Federal Power Commission has often dealt with local service areas and the elimination of duplicate distribution facilities. The Florida Public Service Commission has similarly acted.

In view of this fact, there is at least one reasonable course of action that the Commission could have easily taken herein. The parties should have been required to submit their territorial controversy to either the Florida Public Service Commission or a board[29] composed of representatives of the State of Florida. In discussing the Federal Power Act, Commissioner Seavey stated:

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[29] Section 209 of the Federal Power Act, 16 U.S.C. §824h(a), provides that the Commission "may refer any matter arising in the administration of sections 824-824h of this title to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter."

> "It is admitted that here, as in other cases, where Congress or a State has tried to fit together two jurisdictions, there will be overlapping of those jurisdictions. That is taken care of not only by this joint board sitting upon these matters, but it is taken care of by specific provisions in the act providing for cooperation and coordination between the Federal and State authorities in order that these matters may be worked out equitably and to the full benefit of those who should receive the benefit from regulation."[30]

Further, under the Act, the Power Commission is directed to assist the various state regulatory agencies to the greatest extent possible. Commissioner Seavey emphasized that the objectives of the Federal Power Act were to be accomplished in part by "the coordination of the Federal and State authorities so that the full force for a complete regulation may be exerted."[31] He further noted that this is done *"in order that there may be brought to the consumers all the protection that is possible. . . ."*[32] Mr. DeVane similarly commented that the Act establishes cooperation between the States and the National Government and "permits them to function in unison."[33]

Instead of coordinating with the Florida authorities, the Power Commission undertook to do only two things, both futile. First, the Commission urged the parties to voluntarily resolve their dispute, while stating in its next breath the belief that the parties' "intransigence" would prevent this. Second, the Power Commission simply advised the Florida Public Service Commission of the dispute, knowing full well that the Florida Commission lacks jurisdiction over the Gainesville electric system.[34]

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[30] *Hearings on S. 1725 before the Senate Comm. on Interstate Commerce,* 74th Cong., 1st Sess., at 393 (1935).

[31] *Id.* at 392.

[32] *Id.* at 399.

[33] *Supra,* n. 6 at 525.

Now Florida Power and the residents of Alachua County are left without any remedy. The Federal Power Commission refuses to resolve the problem. The Florida Public Service Commission cannot resolve it. Gainesville refuses to voluntarily discontinue its practices, universally deplored as being adverse to the public interest. This situation represents a total breakdown of the regulatory process.

CONCLUSION

For the foregoing reasons, the Cross-Petition for a Writ of Certiorari should be granted if this Honorable Court should grant the Petition.

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Richard W. Emory,

Robert A. Shelton,

Attorneys for Cross-Petitioner,
Florida Power Corporation.

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[34] In its Order No. 4486, Docket No. 9535 (1968), the Florida Public Service Commission criticizes the Gainesville practice. However, as stated heretofore, it lacks the power to require Gainesville to cease those practices.

APPENDIX A

1. Opinion of Court of Appeals

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27404

FLORIDA POWER CORPORATION, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*
Petition for Review of an Order of the Federal Power Commission (Florida Case)

(May 1, 1970)

Before BROWN, Chief Judge, TUTTLE and MORGAN, Circuit Judges.

BROWN, Chief Judge: In this petition to review a Federal Power Commission order requiring the interconnection of the electrical transportation lines of the Florida Power Company with the distribution system of the City of Gainesville, Florida, primarily to secure emergency back-up power to overcome outages, two basic issues are presented. First, Florida Power contends that the Federal Power Act, 16 U.S.C.A. § 791 et seq., does not give the Commission jurisdiction to order a privately owned power company to interconnect its lines with those of a municipally owned system that both generates and distributes its own power. Second, the Commission's basic policy concerning the terms upon which an interconnection will be ordered is questioned.[1] Florida Power argues that the Commission's policy of looking to the proportionate burdens that each system places upon the interconnected system networks instead of the benefits received as a result of the particular interconnection is inconsistent with the statutory authority to compel the interconnection.[2]

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[1] Florida Power asserts that it should be compensated financially for providing the interconnection. By a subsidiary point it also argues that the City should be restricted in the areas in which it directly competes with Florida Power by duplication of facilities. We believe that the question of duplication of facilities is not directly related to this case and hold that the Commission was proper in refusing to condition the ordered interconnection of facilities on the elimination of this duplication.

We conclude that the Commission has jurisdiction to order this interconnection. We do not believe, however, that the Commission's order concerning the terms of this interconnection is consistent with the statute and thus we refuse enforcement of the order insofar as it fails to compensate Florida Power for making available large quantities of back-up power at the interconnection.

I.

A. The City of Gainesville System

The City of Gainesville owns an isolated electric generation, transmission, and distribution system that serves 17,212 customers in the City and the adjacent areas.

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[2] Section 202(b) of the Federal Power Act, which grants the Commission authority to order interconnection, provides:

> "Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with any such persons: Provided, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them."

16 U.S.C.A. § 824a(b).

This system is projected to have a capacity of 138.4 mw[3] of generation in 1970 with its largest unit rated at 50 mw. The only transmission facilities operated by this system are a 115 kv[4] loop around the City and a 115 kv line to establish connection with Florida Power. The projected maximum peak hour demand (peak load) of the City's system in 1970 will be 102 mw.

B. Florida Power's System

In contrast to the small City of Gainesville system[5] Florida Power operates a major generation, transmission, and distribution system that serves 370,000 retail customers and supplies wholesale power to 12 municipal distribution systems and 9 REA cooperates. It covers 20,600 square miles in West, Northwest, and Central Florida. During 1970 Florida Power will have 2114 mw of generation and projects a peak load of 1826 mw.

Florida Power's *massive* system operates through a backbone transmission network, and is connected with four major electrical systems in peninsular Florida (Tampa Electric Company, Florida Power & Light Company, Orlando Utilities Commission and Jacksonville Electric Authority). It is also connected with Georgia Power Company and Gulf Power Company.

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[3] A megawatt (mw) is a large unit of electric generating capacity. It is 1,000 kilowatts or 1,000,000 watts.

[4] A kilovolt (kv) is a large unit of electrical voltage used to rate transmission lines. Depending upon the size of the conductor a 115 kv line has a capacity of approximately 125 mw.

[5] The disparity in the sizes of the Gainesville and Florida Power systems and in the sizes of their electrical resources is striking and highly significant. These disparities in size are increasing each year as a result of the annual load growth on the Florida Power system being currently almost twice Gainesville's 1966 peak load and in excess of Gainesville's projected 1970 peak load of 102 mw. Gainesville's largest 50 mw generator is dwarfed by 8 generators on the Florida Power system and is about the equivalent of units that Florida Power uses only to meet peak load conditions and frequently are placed on cold shut-down.

C. The Results of the Interconnection

Obtaining emergency reserves[6] — both instantly available and peak load installed capacity — in small isolated systems such as that operated by the City is a difficulty accentuated more by isolation than size. The only two solutions are the acquisition of additional generating capacity that will rarely be used and which is economically inefficient since a large portion of it must be kept in operation or "spinning" in order to provide the essential instantaneous reserve (see note 6, *supra*) or to end the system's isolation by connection with other systems that can provide the emergency reserve.

To acquire emergency reserve of 50 mw, the size of its largest generator, the City chose the latter solution and sought to achieve the desired interconnection through negotiation with Florida Power. When they were unable to come to terms, the City filed an "Application for Interconnection and Complaints Against Unlawful Actions"[7] with the Commission.

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[6] Emergency backup service is providing the reserve of generation which a system must have to protect against inability to supply load in the event of a failure or outage of generation. Generally speaking, it is industry practice to have available a reserve of generating capacity at least equal to the capacity of a system's largest generator. To the extent emergency backup service is available from some other source, a system can reduce its installed reserve of generation. Generally speaking, it also is industry practice to protect against a failure or outage of a system's largest generator by operating at all times a reserve of generation (customarily referred to as spinning reserve) equal to the load being carried by the largest generator in operation. The operating reserve of generation, as distinguished from the installed reserve of generation, is called spinning reserve because it must be in operation and be instantaneously available. If the operating reserve of generation is not instantaneously available with a loss in frequency of less than one-half cycle per second—1/120th of a second—the system will suffer a frequency disturbance that can cascade, trip out other generating units, and shut down the entire system.

[7] The City's charges of unlawful activity relate to the direct competition between the City and Florida Power in rural Alachua County. See note 1, *supra*.

Pursuant to this application a hearing was held. The Presiding Examiner found that an interconnection was clearly in the public interest since the City would be relieved of the necessity of maintaining and adding to its present inordinately large and inefficient generating reserve. Under the terms of the recommended order Gainesville would have an additional reserve capacity equal to the size of its largest generator, would save approximately $300,000 per year[8] in investment and operating cost even after paying the cost of the interconnection,[9] and would have the reliability of a bulk power supply that it could have not previously achieved.

The Presiding Examiner found, however, that the benefits of the interconnection flowed in the direction of the City's system. Florida Power, because of the relatively small size of the City's generators, would receive no significant additional reliability.[10] Because of the automatic nature of the interconnect, however, Florida Power well sell some power to the City in non-emergency situations, but these periods will be rare because the City has already built up large quantities of excess capacity that can be used to meet high demand periods. The Presiding Examiner recommended that, even though no additional facilities would be needed and there would be no undue burden on the Florida Power system, Florida Power should be compensated.

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[8] The Presiding Examiner found that the savings would be "in excess of $300,000." The Commission staff submitted a study showing Gainesville would realize investment and operating savings from reduction of its installed reserve of generation averaging about $231,000 a year for the period of 1970 through 1979. Florida Power witnesses estimated these savings at $520,000 a year.

[9] The Commission and Presiding Examiner agreed that the City should bear the whole cost of building the physical facilities necessary for the interconnection. This will cost between $1,500,000 and $3,000,000 depending on the length of the transmission lines the City chooses to use.

[10] The Presiding Examiner concluded that Gainesville could contribute only 6 mw, 3 mw, and 2.5 mw to Florida Power's system reliability. It seems clear that these amounts are too insignificant to have meaning or value to Florida Power, which must have emergency power instantaneously available (spinning reserve) to withstand outages or more than 400 mw. Moreover, Florida Power's backbone transmission network has so many power sources more efficient and economical than Gainesville's small generators it is totally unrealistic to consider the City's system a significant power source.

He recommended that no set demand charge be imposed on the City. Instead, he recommended that "the total operating benefits in dollars received by each party by reason of the interconnection be computed based on the respective estimates of savings to each, and payment of 50 percent of the difference be made by the party receiving the greater benefit by reason thereof to the party less advantaged . . . ."

The Commission agreed that the interconnection was in the public interest. It concluded, however, that no compensation should be paid. Its decision was based on a policy of responsibilities which it phrased this way:

> "As a general proposition we note that whenever two electric systems with generating capacity undertake to interconnect and operate in parallel it is necessary for them to consider the nature of their respective electrical resources and individual system utility responsibilities, both as a means of evaluating the particular services to be rendered between the connecting systems and in order to ensure that appropriate compensation is afforded, either through service exchanges or financial payments. Marked disparities between two (or more) systems in the reliance placed upon the network should be reflected in the terms and conditions of the interconnection arrangement through appropriate provisions. Each participant should bear its proportionate share of that responsibility. In our judgment, a prerequisite to viable and effective interconnected operations among all electric systems is an equitable sharing of the responsibilities of interconnected operation. Each participant should bear its proportionate share of that responsibility. In doing so, each interconnecting system will meet its utility responsibilities and there will be no economic penal-

> ties for being the last one on the interconnected network."[11]

Pursuant to that policy it concluded that payment for the energy actually used and the City's assumption of the cost of the interconnection adequately compensated Florida Power. As expected revenues from all types of services called for by the compulsory interconnect bear upon compensation, the order prescribed the rates, etc. for the three types of services set out in paragraph 7(d), (e) and (f), which are not to provide instantaneous emergency reserves.[12]

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[11] City of Gainesville v. Florida Power Corp., 1966, ____ F.P.C. ____, ____.

[12] The terms and conditions of the services are set out in paragraphs seven and eight of the order:

> "(7) The terms and conditions of the sale and exchange of electric energy following the effective date of the interconnection, and thereafter, unless and until modified by rate schedule filing completed in accordance with Part 35 of the Commission's Regulations under the Federal Power Act or modified by Commission order, shall be as follows, subject to modification by written agreement of the parties and acceptance by the Commission of such modification:
>
> (a) Installed Reserves: Gainesville shall own or provide generating capacity resources equal to or greater than 115 percent of Gainesville's estimated annual peak-hour demand. The estimated peak-hour demand for any year shall be that given for the calendar year in Schedule 19 of the latest FPC Form 12 Report filed by Gainesville with this Commission, unless otherwise agreed to in writing by the parties.
>
> (b) Economy Energy: If the parties engage in economy energy transactions, payment therefor shall be at the rate per kilowatt hour of one-half the sum of the incremental cost of providing the energy from the seller's resources plus the incremental cost that would have been incurred by providing the energy from the buyer's resources.
>
> (c) Operating Reserves: Gainesville shall maintain spinning and ready reserves in accordance with procedures established by the Florida Operating Committee up to a limit of 15 percent of Gainesville's estimated annual peak-hour demand for ready reserves and up to a limit of 10 percent of that demand for spinning reserves.
>
> (d) Inadvertent Energy Transfers: Inadvertent transfers of energy shall be returned by the receiving party in

II.

Jurisdiction

Florida Power makes a frontal assault upon the Commission's action by a challenge to the Commission's authority to act upon the petition of a generating municipal system. The argument is that Section 202(b) of the Federal Power Act, 16 U.S.C.A. § 824a(b) (see note 2, *supra*), only authorized the Commission to compel a public utility to establish a physical connection with "one or more *persons* engaged in the transmission or sale of

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an amount equal to that received and at comparable times, or shall be paid for as specified in paragraph (7)(g) below.

(e) Emergency Electric Service: Emergency electric service provided for a period of less than 60 minutes shall be treated as Inadvertent Energy Transfer (see paragraph (7)(d) above). Such service, if provided beyond the end of a 60 minute period shall be treated as Scheduled Electric Service (see paragraph (7)(f) below).

(f) Scheduled Electric Service: To the extent of its ability to do so, each party shall provide power and energy to the other for scheduled maintenance of generating or other facilities. Payment shall be in accordance with paragraph (7)(g) below.

(g) Payments: Except for payments related to Economy Energy transactions, described under paragraph (7)(b) above, payments shall be as follows:

(1) Inadvertent energy, if not returned in kind shall be paid for upon 30 days' notice given by the delivering party at the rate of 4 mills per kwh, or the seller's average fuel cost plus 10 percent of such cost, whichever is less at the point of interconnection.

(2) Scheduled Electric Service shall be paid for at the rate of $.05 per kw per day for each kw of actual or scheduled demand, whichever is greater, if paid for by Gainesville or whichever is smaller if paid for by Florida Power, plus 4 mills per kwh or the seller's average fuel cost plus 10 percent of such cost, whichever is less at the Archer Substation.

(8) Gainesville shall reimburse Florida Power for the annual cost associated with providing frequency regulation for its control area until such time as Gainesville installs tie-line bias control equipment in its own system and assumes responsibility for regulation of its own control areas. Florida Power is directed to submit to the Commission a proposed rate schedule

electric energy" (emphasis added). The argument then turns to section 3, the definitional section of the statute, 16 U.S.C.A. § 796,[13] and points out that "person" is defined as "an individual or a corporation" and then that section 3(3) defines "corporation" to expressly exclude municipalities. Florida Power also points out that Section 201(f), 16 U.S.C.A. § 824(f), specifically provides that no

> "provision in this Part [II, which includes Section 202(b)] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing . . . unless such provision makes specific reference thereto."

Despite the apparent cogency of the argument this use of the definitional section of the statute as a limitation on the scope of the Commission's jurisdiction has previously been rejected. In *United States v. Public Utilities Commission*, 1952, 345 U.S. 295, 73 S. Ct. 706, 97 L. Ed. 1020 the Court held that the definitional section did not

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covering this type of service. If the parties cannot agree on how to classify Florida Power's costs associated with the frequency regulation function or on a method of allocating such costs to Gainesville, the Commission shall make the determination of the annual payment due from Gainesville to Florida Power after receiving the views and supporting calculations of each party."

[13] "The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

* * *

(3) corporation means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include municipalities as hereinafter defined;

(4) person means an individual or a corporation

* * *

(7) municipality means a city, county, irrigation district, drainage or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing or distributing power. . . .

16 U.S.C.A. § 796.

limit the Commission's authority over rate regulation.[14] In addition, in *New England Power Co. v. FPC.,* 1 Cir., 1965, 349 F. 2d 258 the First Circuit held that the definitional sections did not limit the power of the Commission to order an interconnection between a public utility and a nongenerating municipality.

Florida Power also argues that, independent of the language of the statute, the legislative history shows that generating municipalities were not "persons" for purposes of Section 202(b). This argument is more viable than the one limited to the language of the statute since both the Supreme Court and the First Circuit specifically reserved the question of whether a "municipality which generates as well as distributes electricity is to be regarded as a 'person' under this section of the Act." *New England Power Co. v. F.P.C., supra,* 349 F. 2d at 263. See also *United States v. Public Utilities Commission, supra,* 345 U.S. at 312-13, 73 S. Ct. at ...., 97 L. Ed. at 1036-37. Moreover, Florida Power's position seems to draw support from the statements of the principal draftsmen of the Act, Federal Power Commissioner Clyde L. Seavey and Mr. Dozier A. DeVane,[15] Solicitor for the Commission. And such statements may be powerful indicia of legislative intent and purpose. *Zuber v. Allen,* 1969, ... U.S. ...., ..., 90 S. Ct. ...., ..., 24 L. Ed. 2d 345, 354.[16]

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[14] The Court relied heavily upon the legislative history to demonstrate that the definitional sections were not controlling. The Court said that it did not "find any evidence of conscious coordination of §§ 3(3), (4) and 201(d) from the legislative history. True, they were simultaneously enacted, and, in fact, the interpolation of the word 'person' into § 201(d) occurred after the §§ 3(3) and 3 (4) definitions were in existence in S 2796, 74th Cong., 1st Sess., as passed by the Senate and reported to the House, June 13, 1935. But this alteration came at the insistence of the House. The Senate had provided for jurisdiction over sales occurring before or after interstate transmission, id., § 201 (f), and the House amendment, from which § 201 (d) in its present form stemmed, covered sales during the transmission across state lines for the first time. So the House Report is, we think, significant in its redefinition of the section: A 'wholesale' transaction is defined to mean the sale of electric energy for resale. HR Rep. No. 1318, 74th Cong., 1st Sess., p. 8. We conclude, therefore, that the Congress attached no significance of substance to the addition of the word person, and in fact did not intend it as a limitation on Commission jurisdiction. Indeed quite the contrary was sought by the House amendment of § 201(d)."
345 U.S. at 313, 73 S. Ct. at ___, 97 L. Ed. at 1036.

On closer examination, however, it is apparent that the statements of Commissioner Seavey and Solicitor DeVane refer only to the Commission's power to order public utilities to act as transporters of — "wheel"[17] — low cost government power to a government customer at the expense of a privately owned company. See, e.g., *Hearings Before the Committee on Interstate and Foreign Commerce,* House of Representatives, on H.R. 5423, 74th Cong., 1st Sess. (1935), 394, 395, 397, 532, 546, 559, 564; *Hearings Before the Committee on Interstate Commerce,* Senate, on S. 1725, 74th Cong., 1st Sess. (1935), 257, 260, 271. And, although there are general statements by them that do not necessarily refer to "wheeling" see e.g., Senate Hearings, *supra* at 256, after close examination of the entire legislative history we can find no support for the conclusion that municipalities which generate their own power were to be treated differently from nongenerating municipalities concerning anything other than "wheeling".[18]

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[15] Later a United States District Judge.

[16] In *Zuber* the Court said: "It would be perverse to assume that congressional drafters, in eliminating ambiguity from the old act, were careless in listing their exceptions and selecting the illustrations from which the Committee Report from which their words would ultimately derive content." ____ U.S. ____, ____ S. Ct. at ____, 24 L. Ed. 2d at 356. It should also be noted that the Supreme Court has previously used this testimony as an indication of legislative intent. In United States v. Public Utilities Comm., *supra,* the Court said that there "is evidence . . . that the exclusion of producing municipalities from Commission jurisdiction was intended. For instance, DeVane, Solicitor of the Federal Power Commission at the time, testified as follows before the Senate Committee . . . [excerpts from testimony]".

[17] Wheeling is where A, which has excess generating capacity, seeks to transmit power to its customer C with whom it has no transmission connection, by using the transmission facilities of B, which has connections with both A and C.

[18] From the legislative history cited by the Court in the *California Utilities* case, *supra,* it is apparent that when it specifically

III.

The Terms of the Ordered Interconnection

Even though the Commission has jurisdiction to order this interconnection and even though the connection is "necessary or appropriate in the public interest" and the interconnection will not put an "undue burden . . . upon" the facilities of Florida Power or "impair its ability to render adequate service to its customers", the terms of the interconnection do not adequately satisfy the statutory requirements[19] because they do not provide Florida Power with the "reimbursement reasonably due" it. See 16 U.S.C.A. § 824a(b), (see note 2, *supra*). This interconnection will be of substantial benefit only to the City. Through the interconnection it receives essential emergency back-up, which is a service at all times instantaneously available, and which protects it against the outage of the largest of its generators. (See IC, *supra*). The benefits to Florida Power, however, are largely illusory.[20]

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reserved the question of generating municipalities it was referring to the problem of "wheeling". See United States v. Public Utilities Commission, 345 U.S. at 312-13, 73 S. Ct. at ——, 97 L. Ed. at 1036-37.

[19] Although Florida Power makes a constitutional attack upon the Commission's action, we find it unnecessary to pass upon the questions raised.

[20] The Commission indicated that it believed Florida Power would receive certain vague but substantial benefits as a result of the interconnection. These vague benefits were (i) possible deferral of future generating units because of coordinate planning of new facilities, (ii) the electrical operating benefits from the availability of the City's small power contribution, and (iii) the possibility of additional reliability from the City's contribution since Florida Power does not have generators in the immediate area (see note 10, *supra*). But these benefits are unrealistic as well as vague. Florida Power's largest present unit has a 527 mw capacity and a 875 mw unit is scheduled to be in operation in 1972. Obviously, any savings from coordinated planning with a system with the largest generator with only a 50 mw capacity are highly theoretical. And the Commission did not even suggest how the interconnection with the City was to contribute operational

But, although there is no direct cost, Florida Power, really its customers, will bear a substantial burden. They must bear the allocated fixed cost represented by the added obligation imposed under the terms of the ordered interconnection. And this burden will be reflected in their cost-based rates. They are entitled to not have to carry the entire responsibility for providing an extremely valuable service.

The Commission's policy of proportionate utility responsibility really works only one way. The small system receives high benefits and, because of its size, no real obligations. The large system, however, receives no benefit but does incur real, substantial responsibilities. Such imaginary equity is not reasonable compensation.

Thus we deny enforcement of this order insofar as no provision for the reasonable compensation of Florida Power is made. The remainder of the order, however, is enforced, and compliance need not be delayed until the amount Florida Power is to be paid is determined by the Commission and that determination reviewed.

But in sending this case back to the Commission for it to fix a formula for computing what would be reasonable compensation, we do not even whisper what that formula should be. On reconsideration the Commission may determine that the set demand charge requested by Florida Power is a reasonable formula. It may determine that the 50 percent-of-the-difference-in-benefits formula of the Pre-

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savings and reliability (reliability is the most unrealistic of all, see note 10, *supra*) to Florida Power.

The Commission's conclusions were, however, tentative as well as vague and unrealistic— "If we were to appraise Florida Power's request for an annual standby charge in terms of 'splitting of the benefits' test . . ." — and are not fact-findings protected by the umbrella of the substantial evidence test. As Mr. Justice Frankfurter said in SEC v. Chenery Corp., 1943, 318 U.S. 80, 93, 94, 63 S. Ct. 454, ..., 87 L. Ed. 628, 636, "Its action must be measured by what the Commission did, not what it might have done". See Schaffer Transportation Co. v. United States, 1957, 355 U.S. 83, 78 S. Ct. 173, 2 L. Ed. 2d 117; 2 K. Davis, Administrative Law Treatise §§ 16.05, 16.09 (1958).

siding Examiner is more appropriate. It may decide to use parts of both, neither formula, or a completely different formula. This is for the Commission subject to later review.

ENFORCEMENT GRANTED IN PART AND DENIED IN PART.

2. Judgment of Court of Appeals

JUDGMENT

This cause came to be heard on the petition of Florida Power Corporation, for review of an order of the Federal Power Commission in Docket No. E-7257, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the order of the Federal Power Commission in this cause be, and the same is hereby enforced in part and denied in part, in accordance with the opinion of this Court.

It is further ordered that petitioner pay two-thirds (⅔) of the costs on appeal in this Court and that respondent pay one-third (⅓) of said cost.

May 1, 1970

APPENDIX B

1. Main Opinion of Federal Power Commission

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Carl E. Bagge, and John A. Carver, Jr.

Docket No. E-7257

GAINESVILLE UTILITIES DEPARTMENT
and
CITY OF GAINESVILLE, FLORIDA
v.
FLORIDA POWER CORPORATION

Opinion No. 550

OPINION AND ORDER DIRECTING PHYSICAL INTERCONNECTION OF TRANSMISSION FACILITIES AND PRESCRIBING TERMS AND CONDITIONS THEREOF

(Issued November 5, 1968)

O'CONNOR, Commissioner:

This proceeding arises out of an Application for Interconnection and Complaint Against Unlawful Actions filed under the Federal Power Act on November 22, 1965, by the Gainesville Utilities Department and the City of Gainesville, Florida (both referred to as Gainesville or City). Gainesville requests (1) an order under Section 202(b) of the Act directing Florida Power Corporation (Florida Power or Corporation or Company) to establish a physical interconnection with Gainesville, and to sell and exchange energy with Gainesville; (2) an order requiring Florida Power to cease certain practices which allegedly discriminate against Gainesville and violate Sections 205 and 206 of the Act; and (3) an order requiring Florida Power to desist from certain actions which allegedly are in restraint of trade and violate Section 10 of the Act.

Florida Power filed a motion to dismiss Gainesville's application and complaint, alleging lack of jurisdiction. Florida Power also filed an answer to such complaint. On April 19, 1966, the Commission directed a hearing on the issues raised by the parties. Hearings were held at various times between November 16, 1966, and March 16, 1967, at Gainesville, Florida, at St. Petersburg, Florida, and at Washington, D. C.

On January 17, 1968, the Presiding Examiner, Martin E. Rendelman, issued an initial decision in which he (1) denied Florida Power's motions to dismiss; (2) ordered a connection between Florida Power and Gainesville, subject to the condition that the parties first negotiate an agreement to eliminate and avoid all duplication of facilities; (3) prescribe the terms and conditions covering the sale and exchange of electric energy; (4) found that an order for interconnection renders moot Gainesville's complaint that Florida Power is violating Sections 205 and 206 of the Act; and (5) found that the evidence does not establish the alleged violations by Florida Power of Section 10 of the Act.

This proceeding is before the Commission on the examiner's decision, exceptions filed by Gainesville, Florida Power, and staff, and oppositions to such exceptions filed by the respective parties. Oral argument was held before the Commission on July 9, 1968. The basic issues involve (1) the jurisdictional question; (2) the conditioning of the interconnection order; and (3) the prescription of rates of payment between the parties.

Holding

For the reasons set forth below we find that the examiner was warranted in denying Florida Power's motions to dismiss and in ordering the interconnection. We further find that the order for interconnection should not be qualified by the pre-condition prescribed by the examiner, and that certain changes are appropriate in the rates proposed by the examiner.

Background

The City of Gainesville owns an isolated electric generation, transmission, and distribution system, valued at $21,104,036,[1] which is operated by the Gainesville Utilities Department. This system serves 17,212 retail customers in a 22 square mile area covering the City and adjacent portions of Alachua County, Florida. In 1965 Gainesville's generating plant had a total capability of 108.4 mw as against a peak load of 51.1 mw. The system's reserve capacity was 57.3 mw or 112.1 percent of peak demand. Gainesville anticipates a peak load of 102 mw by 1970.

Florida Power is a "public utility" subject to the jurisdiction of the Commission. Its system, currently valued at $500,000,000, includes substantial generation, transmission, and distribution facilities. Florida Power is interconnected with and operates in parallel with the Interconnected Systems Group and with the Florida Power & Light Company, Tampa Electric Company, Orlando Utilities Commission, and the City of Jacksonville. Florida Power presently serves 370,000 retail customers, and it supplies power at wholesale to 12 municipal distribution systems and to nine REA cooperatives. Florida Power's service area covers 20,600 square miles in west, northwest, and central Florida, and includes Alachua County as well as 31 other counties.

Florida Power's generating plants have a capability of 1595 mw. Peak load for the system was 1232 mw in 1966. The Corporation is installing a 525 mw unit for service in December 1969, and it is planning to install a 875 mw nuclear-fueled unit for service in mid-1972. Florida Power estimates its annual growth rate is about seven percent or currently 100 mw per year, and it anticipates a peak load of 1826 mw for 1970.

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[1] Unless otherwise stated, the statistics in this opinion usually reflect operations for the year 1965 or in some cases 1966, as set forth in the evidence of record in this proceeding.

Gainesville's Proposal for Interconnection

Gainesville proposes to establish a physical connection with Florida Power's transmission system by constructing a 115 kv line to the Corporation's Archer Substation on Florida Power's 230 kv line from Fort White to Silver Springs, Florida. Gainesville proposes to install a 230/115 kv step-down transformer with a capacity of 36/60 mva, or, as recommended by staff, of 60 mva. The cost of this installation, including transmission line, transformer, and related equipment, is estimated at $1,500,000 if seven miles of 115 kv line are required, and at double this amount if 14 miles of 115 kv line are constructed all the way to Gainesville's own generating plants. Gainesville plans that the interconnection will be operated closed at all times except when opening is required for safety, maintenance, or repairs.

Gainesville contends that the interconnection will be in the public interest because it will enable the two systems to exchange economy energy, pool their reserves, exchange capacity, and coordinate construction of generation at substantial financial savings to both; that it will place no undue burden upon Florida Power; and that it will not require Florida Power to enlarge its generating facilities. Florida Power, on the other hand, asserts that the Commission is without jurisdiction to act on Gainesville's application, but it adds, without waiving its legal position, that it will be agreeable to a voluntary connection under conditions which will safeguard its service area, protect it from wasteful competition, and assure payment of reasonable compensation for its services. As of this date, Gainesville and Florida Power have not been able to reach an agreement on the conditions proposed by Florida Power.

The Question of Jurisdiction

Florida Power maintains that Gainesville, as a municipal corporation, is not a person within the meaning of Section 202(b) of the Act, and that the Commission therefore has no authority to order the proposed interconnection. We find no merit in this argument which plainly is based upon an incorrect interpretation of the meaning or Section 202 (b). Florida Power's contention is similar to arguments which were previously raised and were rejected by us in *Shrewsbury Municipal Light Department v. New England Power Co.*, Opinion No. 438, 32 FPC 373, (1964), *affirmed, sub. nom., New England Power Co. v. Federal Power Commission,* 349 F. 2d 258 (CA 1, 1965); *Crisp County Power Commission v. Georgia Power Company,* Docket No. E-7120, Tentative Opinion No. 508 (1966); *City of Paris, Kentucky v. Kentucky Utilities Co.,* Opinion No. 525 (1967), remanded on other grounds in *City of Paris v. Federal Power Commission,* ...... F. 2d ...... (CADC, July 3, 1968). The examiner correctly denied Florida Power's motion to dismiss.

The Basis for Interconnection

The statutory provisions which govern this proceeding are those set forth in Section 202(b) of the Federal Power Act. This section provides that the Commission may order an interconnection when it finds that such action is necessary or appropriate in the public interest, and when it also finds that no undue burden will be placed upon the public utility affected by the order. The Commission's authority is specifically limited by two qualifications: (1) it shall not compel the enlargement of generating facilities for the purpose of the interconnection order; and (2) it shall not compel the affected public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

Applying these standards, this record affirmatively shows that the proposed interconnection between Corporation and Gainesville is desirable and in the public interest. Each system will gain financial and engineering benefits from the interconnection. The record also shows that the ordered interconnection will not place an undue burden upon Florida Power, will not require the Corporation to enlarge its generating facilities, and will not impair Florida Power's ability to render adequate service to its customers. Our reasons are set forth in detail hereafter.

In addressing them we deem it important at the outset to emphasize a basic distinction which was not articulated by the Examiner but is central to our analysis. We refer to the initial step of evaluating the electrical resources to be operated under interconnected conditions and as a part of that process to distinguish those factors which involve system electric reliability or the capacity to serve, from marketing or pricing policies which a utility may adopt in selling electric power and energy in bulk at the wholesale level. These differing considerations tend to be obscured in the opposing economic arguments advanced by Florida Power and Gainesville with respect to their proposed terms and conditions for operating in parallel. Hence, the restatement of the specific contentions of the parties, without more, creates difficulty in understanding the resolution which we make of one of the major disputes in this case: Florida Power's request for a standby charge to Gainesville equal to $3.08 times the installed capacity of the City's largest generating unit. As a part of our overall assessment of the benefits and responsibilities of Gainesville and Florida Power in operating under interconnected conditions, we have evaluated their respective electrical resources, including the generating units of both and the effect of adding Gainesville as an additional point of connection upon Florida Power's system.

As a general proposition we note that whenever two electrics systems with generating capacity undertake to interconnect and operate in parallel it is necessary for them to consider the nature of their respective electrical resources and individual system utility responsibilities, both as a means of evaluating the particular services to be rendered between the connecting systems and in order to ensure that appropriate compensation is afforded, either through service exchanges or financial payments. Marked disparities between two (or more) systems in the reliance placed upon the network should be reflected in the terms and conditions of the interconnection arrangement through appropriate provisions. Each participant should bear its proportionate share of that responsibility. In our judgment, a prerequisite to viable and effective interconnected operations among all electric systems is an equitable sharing of the responsibilities of interconnected operation. Each participant should bear its proportionate share of that responsibility. In doing so, each interconnecting system will meet its utility responsibilities and there will be no economic penalties for being the last one on the interconnected network.

Here the City and Corporation agree that an electrical interconnection should be established. Their basic differences reflect a series of economic and financial considerations; chiefly, what operating responsibilities each should bear, and what charges should be assigned to each system.

Uses of the Proposed Interconnection

All parties agree that the contemplated interconnection would be used initially as follows: for purposes of sharing generating reserves between Florida Power and Gainesville; to facilitate the exchange of hourly non-firm economy energy transfers between the two systems; for weekly or other short term purchases of electrical capacity and related energy by the Corporation or the City; to permit either system to supply to the other replacement energy during periods of scheduled outage for equipment maintenance purposes; and to meet system electric needs during emergency outages of operating equipment of the City or Florida Power.

The degree to which these various types of service will be utilized by either party is a matter for decision by personnel of Florida Power and Gainesville. Electrical flows between the systems to complete economy energy transactions, short term sales of electric capacity and related energy, maintenance replacement energy and emergency service will be controlled by the system dispatchers.

In addition to scheduled transfers between Florida Power and Gainesville, there will be non-scheduled or inadvertent flows through the proposed interconnection. These flows will be instantaneous and occur as generating sources and connected electric loads shift. Depending upon the originating cause they may be in the direction of Florida Power or in the direction of Gainesville.[2] As in the case of scheduled flows, the ultimate limiting factor controlling the magnitude of the inadvertent transfer in either direction is the electrical capacity of the facilities to be installed between the Company and City, 60,000 kva.[3]

Uses of System Generating and Transmission Facilities

Under the terms and conditions of the interconnection as specified in this opinion and order, each system (Florida Power and Gainesville), will be responsible for its own generating capacity and reserve requirements.

We accept and approve the Examiner's conclusion as to the installed and operating reserves of Gainesville and Florida Power. As expressed in this opinion, we are satisfied that an appropriate basis has been shown for evaluating Gainesville's generating resources and for assigning to the City a reserve responsibility. Briefly, they are those requirements which apply to Florida Power a a member of the Florida Operating Committee, and those which the Corporation applies to itself by reason of its utility operating practices.

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[2] Flows in either direction may reflect occurrences on the Florida Power or Gainesville systems, the systems of other members of the Florida Operating Committee with which the Corporation interconnects, or the systems of utilities operating outside the State of Florida which are electrically connected with Florida Power. Presently, approximately 94 percent of the total installed generating capacity of the Nation's electric utilities is interconnected and operates in electrical synchronism, including members of the Florida Operating Committee.

[3] Various briefs of Florida Power denominate these inadvertent transfers as instantaneous emergency service. They are urged as a principal justification for the Corporation's requested "standby charge" of $3.08/kw up to the capacity of the City's largest generating unit. Gainesville does not seek to apply any such charge against the Company. Florida Power does not assess a similar charge against any other system with which it interconnects, nor does any other member of the Florida Operating Committee. Indeed, the staffs review of pooling agreements and bilateral arrangements between large and small systems described in the record did not reveal any other example of such a charge.

As set forth in finding (7)(a), Gainesville is required to own or secure from others generating capacity equal to or greater than 115 percent of the City's estimated annual peak hour demand. Under finding (7)(c), Gainesville must maintain ready reserves up to a limit of 15 percent of the City's estimated annual peak hour demand and up to a limit of 10 percent of that demand for spinning reserves. In the light of current reserve practices being followed by Florida Power and other members of the Florida Operating Committee, these requirements will insure that Gainesville discharges its utility service obligations to provide sufficent generating capacity and resources, installed and operating, to supply the needs of its utility consumers.

Following completion of the proposed interconnection, Gainesville's transmission facilities (principally the 115 kv line to be constructed from the City's existing circuits to the point of interconnection at Florida Power's Archer Substation) will function as a means of interconnecting the City's system with that of Florida Power. Florida Power's transmission network functions, and will continue to function, as a means of interconnecting the Corporation's own generating, purchased power and interchange sources and for delivering power to the Corporation's load centers. After connection, Gainesville will become an additional interchange power source on that network.

Compensation

Gainesville has agreed to absorb the entire cost of the facilities needed for the proposed interconnection. There will be no direct facilities cost to Florida Power. Depending upon final construction plans, the City's capital costs for this purpose will be in the order of $3,000,000. This investment will be required for about 15 miles of 115 kv transmission from Florida Power's Archer Substation to the City's generating station including transformation facilities at both ends.

Insofar as the proposed interconnection is used for economy energy, maintenance replacement energy and emergency service, we adopt the types of compensations (financial payment or return in kind) to Gainesville and Florida Power as set forth in the Examiner's decision and findings (7)(b), (d), (e) and (g)(1) below. The parties do not object to the Examiner's decision in these respects.

Gainesville and Florida Power both filed exceptions to the Examiner's finding in paragraphs (7)(f) and (7)(g) that scheduled electric service shall be paid for at the rate of $.08 per kw per day. Gainesville maintains that the rate should be $.05 per kw per day for both parties. Florida Power states that it is willing to sell to Gainesville at the rate of $.05 per kw per day, but it contends that it should pay Gainesville less than $.05 per kw per day because Gainesville's total fixed charges are lower on a percentage basis than Florida Power's. Upon the showing of this record, we find that the rate of $.05 per kw per day is appropriate for both parties.

We note that one responsibility of interconnected operation has not been specifically mentioned in the examiner's initial decision. Florida Power and the other members of the Florida Operating Committee each incur annual costs associated with providing frequency regulation for its own control area. Until such time as Gainesville installs an interconnection with another member of the Florida Operating Committee, Gainesville will be within the control area of Florida Power. Staff testified that it would be appropriate for Gainesville to make an annual payment to Florida Power which would represent its proportionate contribution toward Florida Power's annual costs for providing regulation in the control area and that such annual payment should be terminated when Gainesville installs tie-line bias control equipment in its own system and thereby assumes responsibility for regulation of its own control area. We agree. Accordingly, Florida Power will be directed to submit a proposed rate schedule covering this type of service. If the parties cannot agree on how to classify Florida Power's costs associated with the frequency regulation function or on a method of allocating such costs to Gainesville, the Commission shall make its own determination of such annual payment after receiving the views and supporting calculations of each party.

These charges for services, of which either party may avail itself,[4] will adequately compensate both Florida Power and Gainesville in providing the services. The reserve capacity which we are requiring Gainesville to maintain will assure that Gainesville does not unduly burden Florida Power. The record in this case demonstrates that Gainesville will place no disproportionate burden or reliance on the facilities of the Corporation and thus should not be penalized either in terms of greater reserve capacity requirement than that carried by the other systems in the coordinating area or in terms of a demand charge.

The Standby Charge

Under present conditions Florida Power's request for a standby charge would impose an annual payment approximating $150,000 upon Gainesville. The Examiner rejected Florida Power's recommendation and in lieu thereof proposed that the total operating benefits in dollars received by each party by reason of the interconnection shall be computed based on the respective estimates of savings to each, and payment of 50 percent of the difference shall be made by the party receiving the greater benefit to the party receiving the lesser benefit.

Florida Power excepted to the failure of the Examiner to approve its request for a demand charge of $3.08 per kw per year, multiplied by the 50,000 kw capability of Gainesville's largest generator, but generally found the Examiner's 50-50 split proposal satisfactory, provided that the parties could overcome the administrative difficulties expected to be encountered in computing the annual savings in dollars. Gainesville and staff, on the other hand, filed exceptions to the Examiner's proposed 50-50 split of benefits. Gainesville argued that such a procedure would be too vague and general even when applied only to the so-called "operating benefits", and in any event could not be applied to all of the types of benefits possible. Staff contended further that the Examiner's proposal was unwarranted and inappropriate; that such proposal could not be justified as a substitute for Florida Power's emergency demand charge; that the difference in operating benefits to the parties from the interconnection would not be sufficient to warrant the condition; and that the proposal was not consistent with prevailing industry practice.

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[4] We emphasize that in this particular case neither Florida Power nor Gainesville is being directed to provide any specific firm power service to the other.

We agree with Gainesville and with staff that the record in this proceeding does not establish any satisfactory justification for the imposition of a per kw demand charge as requested by Florida Power. We are also of the opinion that the 50-50 split proposal of the Examiner is not appropriate.

The reasoning of both Florida Power and the Examiner is inconsistent with what we have determined to be the appropriate analysis of the basic issues here presented: sharing the responsibilities of interconnected operations. As we have explained, that sharing must be based upon, and follow, the proportionate burdens each system places upon the interconnected system networks, not the benefits each expects to receive. Benefits received in any given situation may approximate these responsibilities or they may not. In the course of negotiation of voluntary pooling arrangements, benefits received may, on occasion, serve to offset burdens imposed in determining the appropriate charge for particular services rendered or facilities supplied. But where, as here, the cost of providing such services and facilities and the appropriate charges therefor have equitably been determined after a careful analysis and apportionment of the burdens and responsibilities of each party, there is no basis for any further consideration of relative benefits as proposed by the Examiner.

The evidence before us shows that Gainesville will be contributing its proportionate share of instantaneous emergency service and installed generating capacity, including reserve capacity.

Moreover, the specific type of demand charge requested by Florida Power, namely, the imposition of a charge based upon the size of Gainesville's largest generating unit, would discourage future coordinated planning and operation by reducing the economic incentive for Gainesville to install larger and more efficient generating units. Without such a demand charge, Gainesville could participate more fully in coordinated planning including staggered construction with Florida Power and other systems in Florida to the mutual benefit of all such systems.

If we were to appraise Florida Power's request for an annual standby charge in terms of a "splitting of the benefits" test, this record shows that the proposed intertie will afford both parties opportunities to take advantage of substantial and important benefits: electrical operating benefits and corporate financial savings.

The financial benefits are those which could result from coordinated planning and more intensive utilization of existing generating resources. Savings from coordinated planning of new facilities might involve deferral of future generating units or revisions in power supply contracts with other systems. As to the electrical operating benefits, this record shows that the City will have an additional 60,000 KVA energy source continuously connected to the City's distribution circuits. For the Company, the interconnection will add an additional energy source to its network in a geographic area where the Company has a substantial load (customer demands), but does not have generating plants of its own. Because of that, the expected benefit to Florida Power may be very substantial since the governors have a faster rate of response setting than Florida Power's. Also of great importance to Florida Power is the improved system reliability which the Company will gain through the proposed intertie. That is shown in studies submitted by staff from engineering analyses of loss of load probabilities. They establish that the interconnection will have the effect of improving the reliability of Florida Power's system.

Turning to the particular facts which comprise Florida Power's principal justification for its $3.08/kw standby charge, this record shows a unit cost calculation based upon an assumed use of the Corporation's transmission network for service reliability and emergency back-up service and an assumed use for bulk power deliveries to the Corporation's own utility load centers. The Corporation estimates that its gross investment in its transmission network will total $65,000,000 as of 1970, and that 60 percent of this amount or $39,000,000 should be allocated to system reliability and emergency back-up service. It calculates the annual fixed charges on this $39,000,000 at $5,850,000. It states that Gainesville's proportionate share of such annual charges, at the rate of 15 percent of allocated investment, and assuming a combined load for the two companies of 1,900 mw in 1970, will be $3.08 per kw.

Florida Power's proposed additional standby charge for transmission availability (amounting to $150,000 per year), must be evaluated against the background of its failure to include a comparable charge in any of the contracts voluntarily negotiated with the other systems with which it is interconnected. In these circumstances, Florida Power plainly bears the burden of justifying an apparently discriminatory imposition in this one instance. The evidence falls far short of meeting this burden. The Corporation's allocation of 60 percent of its transmission system investment to service reliability and emergency back-up service is not supported by any engineering analysis as to its appropriateness. This allocation is, in fact, disputed by staff which claims that Florida Power failed to give adequate consideration to certain advantages which the Corporation enjoys from its transmission system such as bulk energy deliveries, and the savings resulting from reduced capacity and energy costs made possible by the installation of larger generating units and by the maintenance of lower reserve requirements. Furthermore, Florida Power did not adduce any operating or engineering facts to establish that Gainesville derives any special operating benefit by reason of Florida Power's interconnecting transmission network apart from that gained by any individual system which is tied into an interconnected network. The affirmative showing of the record in this proceeding is that the proposed interconnection will provide important instantaneous emergency service to Florida Power from Gainesville.

Insofar as Florida Power's investment in its transmission system is concerned, we deem it appropriate to point out that the proposed interconnection will be accomplished at no direct cost to Florida Power. The cost to Gainesville, on the other hand, will approximate $3,000,000.

The Examiner's Condition for Interconnection

A competitive situation exists between Gainesville and Florida Power for customers in the Gainesville area. Gainesville also competes with Clay Electric Cooperative (Clay Electric). During the hearings evidence was submitted showing that since 1962 Gainesville has expanded its service into areas served by Florida Power and by Clay Electric, first by the annexation of adjacent territory to treble the size of the City, and second by the extension of its distribution lines beyond its new city limits into Alachua County. Gainesville negotiated a settlement with Clay Electric whereby it acquired the latter's facilities and customers within the annexed area, but it did not negotiate a similar agreement with Florida Power, and that Corporation continues to serve 22 of its customers within the new city limits. Florida Power also provides retail service to the University of Florida at Gainesville, and is now under contract to continue such service until 1976.[5] Gainesville's extended distribution lines in certain instances duplicate and parallel those of Florida Power and Clay Electric. Prior to the hearings Gainesville constructed 16.2 miles of such duplicating lines at a cost of $165,000, resulting in annual fixed costs and operating expenses of $16,550.

Florida Power and Gainesville accuse each other of engaging in a wasteful duplication of service. On September 14, 1967, Florida Power petitioned the examiner to reopen the proceeding for the purpose of submitting additional evidence showing that Gainesville was intensifying its competitive efforts. The examiner denied the petition to reopen, stating that the allegations were cumulative to facts already in the record. Subsequently, on July 8, 1968, Florida Power petitioned the Commission to reopen the proceeding for the purpose of taking additional evidence showing that since the conclusion of the hearing, Gainesville has constructed approximately 19 miles of distribution lines paralleling and duplicating those of Florida Power, that these lines will serve approximately 35 new customers, chiefly residential and commercial users in new buildings under construction, and that Gainesville has also purchased the Westward Utilities, Inc., a private utility which formerly provided water and sewerage services to electric customers of Florida Power. For the reasons set forth below we are of the opinion that Florida Power's petition of July 8, 1968, does not set forth grounds which warrant the reopening of this proceeding.

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[5] The University of Florida was served by Gainesville prior to 1930. It was served by Florida Power from 1930 to 1935, and again by Gainesville from 1935 to 1948. In 1948 Gainesville advised the University that it could no longer serve it, and the University then resumed service from Florida Power.

Florida Power argued before the examiner that it should not be compelled to interconnect with Gainesville under circumstances whereby the advantages which Gainesville would obtain from the interconnection could be used by Gainesville to assist it in continuing its competition against Florida Power. The examiner accepted Florida Power's argument to the extent that he found it to be in the public interest that the order for interconnection should be qualified by a condition precedent compelling the parties first to reach an agreement whereby the further duplication of facilities will be avoided.

Gainesville and staff filed exceptions to the examiner's condition. They assert that the imposition of the condition is tantamount to a denial of the interconnection because Florida Power will be placed in a position to insist upon territorial limitations which Gainesville will not accept. Gainesville and staff maintain that the benefits from the interconnection will far outweigh any possible detriment resulting from competition at the retail level, and they contend that the question of a territorial agreement should be left for future resolution by the parties after an interconnection has been accomplished. Staff further points out that the interconnection may readily provide the mechanism for decreasing the duplication of distribution facilities of the parties, whereas the continued electrical isolation of Gainesville will compel the City to plan and build larger generating units than it can utilize at all times to capacity, thus forcing it into more aggressive competition for new customers.

Florida Power generally supports the examiner's condition and states that under Florida law it is not expected to serve a competitor. Florida Power adds that it is willing to interconnect voluntarily with Gainesville and to sell and exchange capacity and energy on terms and conditions substantially in accord with those set forth in the examiner's additional findings and conclusions. It proposes a territorial agreement with Gainesville whereby it will turn over to Gainesville 22 residential customers and an ice plant now served by it within the City, and it offers to withdraw its service from any suburban area where Gainesville had constructed parallel distribution facilities as of the time of the hearings. Florida Power intends to continue its service to the University of Florida, and it asks that Gainesville respect the integrity of its revised service area for a period of 15 years.

In presenting their cases on this point Gainesville and Florida Power have relied extensively on decisions rendered by state and federal courts in related and separate areas of law. Notwithstanding such reliance upon precedent in the fields of state utility law, railroad law, and antitrust law, the standards which control are those set forth in Section 202(b) of the Act, which we discussed above.

The Commission is of the view that the competition between Gainesville and Florida Power, although understandably a matter of some annoyance to Florida Power is not currently of major importance. The record before us does not show that this competition, either at the present time or in the near foreseeable future, will impose any undue burden upon Florida Power, nor will it impair the stability or prosperity of Florida Power's $500,000,000 system. We find merit in staff's view that the interconnection may provide the opening mechanism for a program of cooperation between Gainesville and Florida Power, a program which eventually may enable the two systems to reconcile their differences and accomplish the elimination of wasteful duplication. We are also persuaded by staff's argument that the continued isolation of Gainesville will lead only to more aggressive competition on its part.

The foregoing discussion leads us to conclude that the public interest will not be served by the attachment of a condition precedent to an order for interconnection which may prevent the interconnection from being accomplished. The examiner's condition involves the undesirable risk that it can be self-defeating in that it may enable the intransigence of the parties, who thus far have not been able to reach an agreement on this matter, to prevent the interconnection from being consummated. The issue of overriding significance here is that it is in the public interest that the electrical isolation of Gainesville be ended as quickly as possible. The parties do not disagree.

The arguments concerning competitive activities of Florida Power and Gainesville in their retail operations are basically economic contentions. Moreover, they bring into focus public policy considerations of the State of Florida —single or multiple power sources operating within specific retail service areas. Since we cannot resolve the question of whether a given area of Florida shall be served by one, two, or three utilities we see no reason why the result of retail operations of competing systems should control our judgment on whether bulk power facilities should be interconnected and operated coordinately. The regulatory jurisdiction conferred upon this Commission pursuant to Part II of the Federal Power Act does not extend to the regulation of retail rates, charges and services. That is expressly recognized as a matter of State concern. We are directing our Secretary to forward copies of this opinion to the Governor of the State of Florida, and to the Chairman of the Florida Public Service Commission. In doing so, we bring to their attention the showing of this record as to the duplication of retail service lines and competing retail electric operations of Florida Power and Gainesville.

Other Exceptions

We find no merit in Florida Power's exception to the examiner's ruling denying that Corporation's motion to strike staff testimony and exhibits relating to a showing that Florida Power and the other Florida electric utilities with which it is interconnected may benefit from the sale and exchange of firm power on a seasonal basis with the Southern System. The record shows that the question of seasonal diversity exchanges with the Southern System was introduced by Florida Power's own witness, and that the testimony submitted by staff's witness was appropriate in furnishing perspective to the arrangement on diversity exchange between the Southern System and Florida Power.

We further do not agree with Florida Power that the examiner erred in failing to provide that Florida Power may purchase all or part of the 115 kv transmission line to be built by Gainesville so as to enable Florida Power to serve its customers within its service area. We do not find adequate record support for Florida Power's contention. On the basis of the evidence before us, Florida Power's concern on this particular issue appears to be premature and conjectural.

We note that the Examiner did not adopt the proposal by the staff that Gainesville and Florida Power be directed to set up a coordinating committee. We believe there is substantial merit and usefulness in such a committee and we therefore direct the parties to set up a coordinating committee to represent the parties in all matters arising from operations under the interconnection as hereinafter directed.

The Complaints Under Sections 205, 206, and 10 of the Act.

The Examiner denied Florida Power's motion to dismiss Gainesville's cause of action under Sections 205 and 206 of the Act, wherein Gainesville alleged that Florida Power was discriminating against it by interconnecting with other electric utility systems and by refusing to interconnect with

Gainesville. The examiner ruled that a Commission order directing Florida Power to connect its facilities with those of Gainesville rendered moot Gainesville's cause of action under the above sections. Florida Power takes exception to the examiner's ruling, stating that Sections 205 and 206 do not confer any authority upon the Commission to order the two systems to interconnect, and adding that the evidence of record does not establish any violation by Florida Power of these sections. We do not find Florida Power's argument on this point well founded. As staff correctly explains, the Commission has authority under Sections 205 and 206 to review the alleged practices of Florida Power which Gainesville asserted tended to discriminate against the City. Without passing at this time on the question as to whether or not Gainesville's complaint is well founded, it is sufficient for the purposes of this proceeding for us to find that the interconnection which we have ordered will remedy the situation which gave rise to Gainesville's complaint. The complaint before us on this particular point is thus indeed rendered moot.

The examiner also denied Florida Power's motion to dismiss Gainesville's cause of action under Section 10 of the Act. Florida Power alleged lack of jurisdiction and failure of proof. The examiner found that the evidence of record in this proceeding did not establish violation by Florida Power of Section 10(h) of the Act as alleged in Gainesville's complaint. Florida Power asserts error on the part of the examiner, claiming that the two rulings above are inconsistent, and it argues that a question of a violation of Section 10(h) of the Act is a matter for the courts rather than for the Commission. We do not agree with this contention. The Commission plainly has authority to ascertain whether a jurisdictional utility's wholesale rate arrangements are in violation of Section 10(h). See *Pacific Northwest Power Company, et al.,* Opinion No. 418, 31 FPC 247 at 274 (1964). The examiner's disposition of Gainesville's complaint under Section 10 is supported by the record, and we approve his action.

The Commission further finds:

(1) Florida Power Corporation is a public utility within the meaning of Section 201(a) of the Federal Power Act.

(2) The Gainesville Utilities Department and the City of Gainesville, Florida (both referred to as Gainesville), each is a "person" within the meaning of Section 202(b) of the Federal Power Act.

(3) It is necessary and appropriate for the purposes of Section 202(b) of the Federal Power Act, that the Commission order Florida Power to establish physical connection of its transmission facilities, with the facilities of Gainesville at the Archer substation location as set forth in Finding (4) below, to sell energy to and exchange energy with Gainesville upon the terms and conditions as ordered below. Such sale and exchange of energy will not place any undue burden upon Florida Power, nor require Florida Power to enlarge its generating facilities for such purpose, nor impair its ability to render adequate service to its customers.

(4) It is necessary and appropriate in the public interest that a physical connection be established on the transmission system of Florida Power at the location known as the Archer Substation on the Florida Power Suwannee-Silver Springs 240 kv transmission line. Such physical connection shall include the equipment necessary for a 240/115 kv transformation, in accordance with recognized engineering practice. Unless otherwise provided by written agreement of Florida Power and Gainesville, the facilities for such physical connection shall conform substantially with the facilities described in Exhibit 3. Gainesville shall provide or compensate Florida Power for providing the facilities necessary for a 60 mva interconnection at Florida Power's Archer Substation, and also shall provide a 115 kv transmission line and facilities for connecting same to the Gainesville system. The facilities shall be substantially as described in Exhibit 3, modified as necessary for a minimum of 60 mva capacity.

(5) Gainesville shall own, construct, and service the 115 kv transmission line and its termination facilities on the

Gainesville system. Construction, service, and ownership of the physical interconnection facilities at the Archer Substation shall be as agreed upon by the parties.

(6) Florida Power and Gainesville shall proceed to construct in the shortest reasonable time the interconnection facilities referred to in Findings (4) and (5) above.

(7) The terms and conditions of the sale and exchange of electric energy following the effective date of the interconnection, and thereafter, unless and until modified by rate schedule filing completed in accordance with Part 35 of the Commission's Regulations under the Federal Power Act or modified by Commission order, shall be as follows, subject to modification by written agreement of the parties and acceptance by the Commission of such modification:

(a) Installed Reserves: Gainesville shall own or provide generating capacity resources equal to or greater than 115 percent of Gainesville's estimated annual peak-hour demand. The estimated peak-hour demand for any year shall be that given for the calendar year in Schedule 19 of the latest FPC Form 12 Report filed by Gainesville with this Commission, unless otherwise agreed to in writing by the parties.

(b) Economy Energy: If the parties engage in economy energy transactions, payment therefore shall be at the rate per kilowatt hour of one-half the sum of the incremental cost of providing the energy from the seller's resources plus the incremental cost that would have been incurred by providing the energy from the buyer's resources.

(c) Operating Reserves: Gainesville shall maintain spinning and ready reserves in accordance with procedures established by the Florida Operating Committee up to a limit of 15 percent of Gainesville's estimated annual peak-hour demand for ready reserves and up to a limit of 10 percent of that demand for spinning reserves.

(d) Inadvertent Energy Transfer: Inadvertent transfers of energy shall be returned by the receiving party in an amount equal to that received and at comparable times, or shall be paid for as specified in paragraph (7)(g) below.

(e) Emergency Electric Service: Emergency electric service provided for a period of less than 60 minutes shall be treated as Inadvertent Energy Transfer (see paragraph (7)(d) above). Such service, if provided beyond the end of a 60 minute period shall be treated as Scheduled Electric Service (see paragraph (7)(f) below).

(f) Scheduled Electric Service: To the extent of its ability to do so, each party shall provide power and energy to the other for scheduled maintenance of generating or other facilities. Payment shall be in accordance with paragraph (7)(g) below.

(g) Payments. Except for payments related to Economy Energy transactions, described under paragraph (7)(b) above, payments shall be as follows:

(1) Inadvertent energy, if not returned in kind, shall be paid for upon 30 days' notice given by the delivering party at the rate of 4 mills per kwh, or the seller's average fuel cost plus 10 percent of such cost, whichever is less at the point of interconnection.

(2) Scheduled Electric Service shall be paid for at the rate of $.05 per kw per day for each kw of actual or scheduled demand, whichever is greater, if paid for by Gainesville or whichever is smaller if paid for by Florida Power, plus 4 mills per kwh or the seller's average fuel cost plus 10 percent of such cost, whichever is less at the Archer Substation.

(8) Gainesville shall reimburse Florida Power for the annual costs associated with providing frequency regulation for its control area until such time as Gainesville installs tie-line bias control equipment in its own system and assumes responsibility for regulation of its own control area. Florida Power is directed to submit to the

Commission a proposed rate schedule covering this type of service. If the parties cannot agree on how to classify Florida Power's costs associated with the frequency regulation function or in a method of allocating such costs to Gainesville, the Commission shall make the determination of the annual payment due from Gainesville to Florida Power after receiving the views and supporting calculations of each party.

(9) Gainesville and Florida Power shall establish a coordinating or administrative committee to represent the two parties in all matters arising under the interconnection arrangements hereinafter directed. The coordinating committee shall establish an operating subcommittee to be responsible for the day-to-day operations such as operation and maintenance schedules, control and operating procedures, and supervision of accounts.

(10) Within 60 days from the date of this opinion and order Florida Power shall submit to the Commission for consideration a proposed rate schedule reflecting the terms and conditions of the interconnection as set forth in the Findings above.

(11) Florida Power shall report to the Commission the date of commencement of service provided for herein within 30 days following the commencement of such service.

(12) This Commission's direction that Florida Power connect its facilities with those of Gainesville, as set forth in the Findings above, renders moot the allegations in Gainesville's complaint that Florida Power is violating Sections 205 and 206 of the Federal Power Act by interconnecting with other electric utility systems and discriminating against Gainesville by refusing to interconnect with Gainesville.

(13) The evidence of record in this proceeding does not establish violation by Florida Power of Section 10(h) of the Federal Power Act as alleged in Gainesville's complaint.

(14) Apart from the exceptions to the examiner's initial decision which were expressly granted in the foregoing

Opinion and Findings, the exceptions to the examiner's decision should be denied.

(15) Florida Power's petition of July 8, 1968, to reopen the proceeding for the purpose of taking additional evidence should be denied.

The Commission orders:

(A) Florida Power shall establish connection with its facilities with those of Gainesville as described in Finding (4), *supra,* as soon as Gainesville completes the transmission lines and other facilities necessary to such interconnection, and thereafter Florida Power shall sell, supply, and exchange energy to and with Gainesville under the terms and conditions prescribed in Findings (7), (8), and (9).

(B) Florida Power shall notify this Commission when the interconnection ordered in Paragraph (A) is established and operative.

(C) The examiner's decision to the extent not inconsistent herewith is hereby adopted as part of this Opinion.

(D) Florida Power is ordered to comply with the directives set forth in Findings (8), (9), (10), and (11).

(E) Exceptions not expressly granted are hereby denied.

(F) Florida Power's petition of July 8, 1968, to reopen the proceeding for the purpose of taking additional evidence is denied.

By the Commission.

Commissioner Bagge concurring filed a separate statement appended hereto.

Gordon M. Grant,

Secretary.

(SEAL)

Bagge, Commissioner, concurring:

I cannot join in this opinion without expressing my concern for the irrational behavior engaged in by the parties to this proceeding. A rational society cannot tolerate the economic waste which has been documented on this record. If regulation is to serve any function at all, it should, at least, preclude meaningless duplication.

CARL E. BAGGE

Carl E. Bagge

2. Opinion on Rehearing of Federal Power Commission

OPINION No. 550-A

MEMORANDUM OPINION AND ORDER DENYING APPLICATION FOR REHEARING

(Issued January 2, 1969)

O'CONNOR, Commissioner:

By Opinion No. 550 and Order dated November 5, 1968, the Commission found that it was necessary and appropriate for the purposes of Section 202(b) of the Federal Power Act to order the Florida Power Corporation (Florida Power or Corporation) to establish physical connection of its transmission facilities with the facilities of the Gainesville Utilities Department and the City of Gainesville, Florida (both referred to as Gainesville or City), and to order Florida Power to sell energy to and exchange energy with Gainesville under certain specified terms and conditions.

On December 3, 1968, Florida Power filed an Application for Rehearing of the above opinion and order, stating that the Commission had erred (1) in finding jurisdiction; (2) in evaluating the basis and uses of the proposed connection; (3) in prescribing compensation or financial payments; and (4) in failing to condition the interconnection upon the prior agreement of Gainesville to eliminate and avoid wasteful duplication of facilities.

Upon consideration of the application of Florida Power and the numerous arguments set forth therein, the Commission finds that the grounds advanced for rehearing are not persuasive. These grounds are for the most part restatements, often in the same or similar terms, of arguments submitted by Florida Power earlier in this proceeding before the examiner and before the Commission. The arguments so restated include, among others, all of the arguments on the jurisdictional question; all of the allegations to the effect that Florida Power will gain no financial or engineering benefits from the interconnection; the assertions that Florida Power is entitled to charge Gainesville a demand charge of $3.08 per kw per year times the 50 mw capability of Gainesville's largest unit, and that without provision for such a demand charge the Commission's order will constitute an unconstitutional taking of Florida Power's property; and the arguments relating to the necessity for a conditioned interconnection order under which Gainesville will agree to eliminate and avoid wasteful duplication of facilities. The above contentions were all thoroughly considered and were rejected by the Commission in the preparation of Opinion No. 550 and Order.

In addition to the above, Florida Power advances certain grounds for rehearing which call for specific comment. Thus, throughout its application, the Corporation emphasizes the contention that Gainesville will not be able to render any service of significant value to Florida Power. Upon consideration of this argument we find that Florida Power has greatly underestimated Gainesville's capacity to be of service to the Corporation. Because of its electrical isolation, Gainesville has maintained a very large reserve capacity in relationship to its peak load. In 1965 its peak load was 51.1 mw, and its reserve capacity was 57.3 mw or 112.1 percent of peak demand. Although the purpose of this interconnection proceeding is to enable Gainesville to lessen its need for self-reliance, Gainesville's reserve capacity will continue to be large even after interconnection. The staff's witness has testified that during the ten year period 1970-1979, Gainesville's average minimum reserves at the time of Florida Power's annual peak hour demand will be 43 percent. According to staff's computations, Gainesville will be able to deliver, if there will be sufficient interconnection transmission facilities, anywhere from 60 mw to 100 mw to Florida Power during certain periods in January, April, and September 1970. This prediction that Gainesville will be able to furnish capacity of this magnitude to Florida Power plainly refutes Florida Power's assertion that the interconnection will prove to be a one-way street with all the benefits flowing from the Corporation to the City. The Commission is satisfied that the interconnection will permit a reciprocal exchange of benefits to the mutual advantage of both systems.

The above discussion as to Gainesville's future reserve capacity furnishes the ready answer to Florida Power's contention that the Commission erred in finding at pages 7 and 8 of Opinion No. 550 that "the ultimate limiting factor controlling the magnitude of the inadvertent transfer in either direction is the electrical capacity of the facilities to be installed between the Company and City, 60,000 kva." Contrary to Florida Power's assertion, the evidence does establish that Gainesville will have electrical resources to permit a transfer to Corporation of 60,000 kva. Moreover, despite Florida Power's statement that the proposed connection could carry a 100 percent overload, thereby subjecting the Corporation's system to a transfer of 120,000 kva to Gainesville, it is plain that the load carrying capability of the connection will be limited by Gainesville's transmission line which is to be designed for 60,000 kva. According to the record, such line may carry an overload up to 80,000 kva, but only for short periods of time during cold weather.

Staff's studies of Gainesville's future reserve capacity also serve to refute Florida Power's allegations that there is "no scintilla of evidence" to support the Commission's finding that Gainesville will become an additional interchange power source on Florida Power's network after the interconnection is consummated. Similarly, staff's studies rebut the Corporation's assertions regarding the insignificance of Gainesville's anticipated capacity contributions.

Florida Power takes issue with the Commission's findings that the Corporation agrees that the electrical interconnection should be established, and that the Corporation will be able to make some use of such interconnection. Florida Power argues that it has consistently maintained that the connection is not necessary and is not appropriate in the public interest. Florida Power's assertions on this point are not consistent with its prior pleadings. In its opening brief before the examiner, the Corporation stated that given the terms and conditions which it requested, it "is agreeable to a voluntary connection with Gainesville", that it proposes scheduled electrical service between the two systems, and that it is agreeable to seasonable exchange on a voluntary basis by mutual agreement of the parties. Plainly, the Corporation's assertions of error are not persuasive. We deem it appropriate, however, to modify our findings of the Corporation's position of agreement with qualifying language showing that Florida Power's position is subject to the conditions which it set forth in its pleadings. We also find it appropriate to delete from Opinion No. 550 the final sentence of the second paragraph on page 18, where we indicated that Florida Power was not in disagreement with our position that the "issue of overriding significance here is that it is in the public interest that the electrical isolation of Gainesville be ended as quickly as possible." Florida Power evidently does not agree with this view.

Florida Power disputes our findings at pages 4, 9, and 15 of Opinion No. 550 that Gainesville's capital cost for the interconnection will approximate $3,000,000. Florida Power claims that Gainesville's cost will be only $1,500,000, and that any costs above this amount will represent expenditures required for Gainesville's internal purposes. The record shows that the consulting engineer retained by Gainesville testified that the investment for transmission facilities required to interconnect Gainesville's generating plant with Florida Power's system would be double the figure of $1,500,000. In light of the above explanation, we find that the expenditure of $3,000,000 will be required in order to enable Gainesville's generating capacity to flow into Florida's system.

Florida Power asserts that the Commission erred in finding that the interconnection will add an additional energy source in an area where Florida Power has no generating plant. The Corporation states that it now has three energy sources to supply its load in the Gainesville area and that it does not need a fourth. Florida Power's Form 12 for 1965 shows that the Corporation's Suwannee Plant is the closest generating source to its Gainesville load center. This plant is more than 75 transmission line miles away from this load center. The next closest plant is the Inglis Station which is more than 80 transmission line miles away. Florida Power's three energy sources are connected to the Gainesville load area by 69 kv transmission lines. According to staff, two of these lines serve other loads and could be vulnerable to outages. We agree with staff's position that the connection with Gainesville's generating resources would upgrade service reliability to the Corporation's customers in the Gainesville area.

Florida Power further contends that we have failed to give proper consideration to the fact that on at least two occasions Florida Power has voluntarily negotiated with other systems financial payments to offset lack of reciprocity or mutuality of an interconnection. Florida Power refers to its agreement with the Florida Power & Light Company whereby the latter company paid all of the fixed charges and administrative costs of a connection until it became mutually beneficial. It also refers to its agreement with the Gulf Power Company to whom Florida Power is now paying a fee for a connection which is not mutually beneficial. We have considered both of the cited cases and we do not find their precedent applicable here. In the Florida Power & Light Company situation, that company paid for the fixed charges of a circuit for one year when it required the use of the line and when Florida Power did not. In the Gulf Power Company case, Florida Power paid Gulf Power for the use of a line which the latter company constructed for Florida Power's needs and not for its own. Neither of these cases resembles the Gainesville situation in that Gainesville proposes to construct at its own expense transmission facilities which will be mutually beneficial to itself and to Florida Power. Florida Power also refers to a new connection which it voluntarily negotiated with another system after the close of the hearing under an agreement whereby the other system will pay Florida Power for emergency service $3.08 per kw per year times the capacity of the other system's largest unit. No probative significance as to a generally-established industry practice can be attached to this one instance. Moreover, there is no assertion that the new connection and the Gainesville situation are substantially similar from a factual standpoint.

Consideration has been given to Florida Power's statement that we erred in directing the Corporation to submit a proposed rate schedule for providing frequency regulation in Gainesville's control area until Gainesville installs tie-line bias control equipment. Florida Power contends that the Gainesville system and load will be so small that any charge Florida Power might make for adding Gainesville to Florida Power's control area for frequency regulation will be too insignificant to justify the cost of preparing and administering a rate schedule. In light of this contention, the Commission finds that the submission of the proposed rate schedule shall be made optional at Florida Power's discretion.

The Commission finds:

The assignments of error and grounds for rehearing set forth in the Application for Rehearing filed in this proceeding by the Florida Power Corporation present no facts or legal principles which would warrant any change in or modification of the Commission's Opinion No. 550 and Order except as specified below.

The Commission orders:

(A) The first sentence in the final paragraph on page 6 of Opinion No. 550 is modified by the following new footnote 1a:

> 1a. The findings made in this opinion which attribute to Florida Power a willingness to interconnect or an agreement as to the suitability of the interconnec-

tion are subject to the reservation that Florida Power's expressions of agreement are qualified by the conditions set forth in its pleadings.

(B) The final sentence of the second paragraph on page 18 of Opinion No. 550 is deleted.

(C) A new sentence is added to finding paragraph (8) of Opinion No. 550, as follows:

> In the event that Florida Power elects not to assess Gainesville with any portion of the annual costs associated with providing frequency regulation for its control area, it shall report such determination to the Commission, and the Commission may then waive the above requirements of this paragraph.

(D) Except as provided in ordering paragraphs (A), (B), and (C) above the Application for Rehearing filed in this proceeding is in all respects denied.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Acting Secretary.

APPENDIX C

INITIAL DECISION

OF THE PRESIDING EXAMINER UPON FORMAL COMPLAINT AND APPLICATION FOR INTERCONNECTION

(January 17, 1968)

RENDELMAN, *Presiding Examiner:* On November 22, 1965, the City of Gainesville, Florida, and the Gainesville Utilities Department (hereinafter collectively referred to as Gainesville) filed with this Commission an "Application for Interconnection and Complaint Against Unlawful Actions." Gainesville therein (1) applied for an order, pursuant to Section 202(b) of the Federal Power Act (Act), directing the Florida Power Corporation (Florida Power or the Company) to establish an interconnection with Gainesville and to sell and exchange energy with Gainesville under the same terms and conditions at which it sells and exchanges energy with other electric utilities; (2) alleged that Florida Power's rates, charges, rules and regulations are unlawful and discriminatory in violation of Sections 205 and 206 of the Act, and requested that an order be issued directing Florida Power to desist from such practices and (3) charged that Florida Power has attempted to, or has entered into combinations, agreements, arrangements, or understandings with other utilities to limit the output of electrical energy, to restrain trade, and to fix, maintain or increase prices for electrical services in violation of Section 10 of the Act.

Gainesville operates an isolated electric generating, transmission and distribution system serving retail customers in the City of Gainesville and in the suburban area of the City in surrounding Alachua County. Its generating plant as of the time of this proceeding had an installed name-plate capacity of 101.3 megawatts, consisting of steam units of 44 mw, 22 mw, 16.5 mw, 12.6 mw, 5 mw and a one-mw diesel unit, with a total maximum dependable capability of about 108.4 mw.

The testimony indicates that a new 15-mw gas turbine generator will be added by June 1967, and a second 15-mw gas turbine generator by June of 1968. As of December 31, 1965 Gainesville had some 17,250 customers with a peak load in 1966 of 54.5 mw. Gainesville's average annual load growth is 15.3 percent which, if sustained, will achieve a peak load of 102 mw by 1970. Energy usage has been increasing at the rate of 14.7 percent annually. As of September 30, 1965, Gainesville had a net investment in electric utility plant of $21,104,036, operating revenues of $4,766,721 and a net income from electric operations of $1,182,373.

Florida Power Corporation, whose service territory includes Gainesville and surrounding Alachua County, owns and operates a large bulk power system in 32 counties in west, northwest and central Florida. It has approximately 343,000 retail customers and supplies power at wholesale to 12 municipal distribution systems and 9 REA Cooperatives. Its generating facilities include 8 steam generating plants with a name-plate rating of 1414.8 mw and a maximum dependable output of 1587 mw; a small hydro plant of 8 mw; 7 old inefficient low-pressure units with a combined maximum dependable output of 88 mw on cold standby used only to meet short term winter peaks, with two units having a combined capacity of 65 mw to be added to cold standby by 1970 or 1971. Florida Power has units of 404 mw, 232 mw, 125 mw, 88 mw, 84 mw, and 80 mw, of which the smallest has almost twice the capacity of Gainesville's largest unit. Additionally scheduled for service in December 1969 is a 525-mw unit and bids are presently being invited on another generator of 550 mw or larger for service in mid-1972. Florida Power's depreciated original cost investment in generation is $150,652,786 and the estimated cost of the unit to be completed is $36,700,000. Its transmission system consists of 410 miles of 230 kv, 1156 miles of 115 kv and 1409 miles of 69 kv. The system delivers power from source of generation to load centers and furnishes system reliability in that it can deliver reserve power from its own system or from interconnections to any point on the system where required in the event of a power loss. As of December 31, 1965 the total depreciated value of Florida Power's backbone transmission network was $52,034,472 of which 40 percent is for normal peak load service for delivery of power to load centers, and 60 percent for system reliability. Peak load for the system was 1232 mw in 1966. Annual growth rate is estimated at approximately 7 percent or 100 mw per year with 1826 mw projected by 1970.

Florida Power is interconnected with other electric systems in Florida by six interconnections with Tampa Electric Co., two with Orlando Utilities Commission, and by interconnections between Tampa Electric and Florida Power & Light Company, Florida Power & Light and Orlando Utilities Commission, and Florida Power & Light and the City of Jacksonville. These interconnections operate at 230 kv, 165 kv or 69 kv, with the higher voltage lines operating closed under free flowing load conditions, thus enabling the five systems to coordinate the operation and maintenance of generating units and to deliver larger blocks of energy during an emergency.

The Florida Operating Committee is composed of the representatives of the five principal interconnected electric systems of Florida.[1] Its primary function is the coordination of the day-to-day operating problems of its members relating to bulk power supply facilities and, *inter alia,* establishes operating reserve requirements for the group as a whole. It also apportions operating reserves pursuant to a formula uniformly applied to each individual member. No planning standard for the determination of installed reserve requirements of the members has been established nor have the members apportioned such reserve requirements among themselves. Despite the absence of any established standard, each member of the Committee is nevertheless enabled to install larger, more efficient generating units and to carry smaller installed reserves than if operating as an isolated system. Florida Power, in addition, has separate bi-lateral contracts with Tampa and Orlando for the purchase of power to coordinate installation and maintenance of units and for back up in the event of an emergency. Seven interstate transmission ties are maintained with Georgia Power Company at 230 kv, 115 kv or 69 kv and two with Gulf Power Company for the mutually advantageous use and exchange of power and for emergency purposes.

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[1] Florida Power Corporation; Florida Power & Light Company; Tampa Electric Company; Orlando Utilities Commission; City of Jacksonville, Florida.

Since 1927 Florida Power has maintained distribution lines and has provided service to retail customers in the area to the west and southwest of Gainesville. As of the first half of 1966 Florida Power served an average of approximately 1400 retail customers through its Gainesville substation. Within the city of Gainesville, Florida Power has provided service at retail to the University of Florida since 1948,[2] and on January 1, 1966, executed a new contract for another ten years.

Also serving the Gainesville area to the west, north and east of the city is the Clay Electric Cooperative, a typical rural electric cooperative, which provides service at retail to these rural and suburban areas with power purchased at wholesale from Florida Power. With the expansion of the city's boundaries on January 1, 1962, whereby Gainesville tripled its area within city limits by annexation, a number of Clay Electric's customers and 26 customers of Florida Power found themselves within the new city limits. Customers of Clay Electric so affected were transferred to Gainesville by means of a negotiated settlement, but 22 of the 26 Florida Power customers in this area are still served by the Company.

Since the 1962 annexation, Gainesville has expanded its system further into Alachua County beyond existing city limits by the construction of primary distribution lines which duplicate and parallel lines of Florida Power and Clay Electric with resultant direct competition for new customers in that area. Since 1964 the city has constructed approximately 16.2 miles of such duplicating lines and since the close of this hearing has constructed additional lines which further duplicate existing lines of Florida Power along County Road SW 29 and County Road SW 30 in Sections 9, 10 and 11 of Alachua County.[3]

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[2] Prior to 1930 the University was served by Gainesville; from 1930 to 1935 by Florida Power, and from 1935 to 1948 by Gainesville.

While the manager of Clay Electric testified that he is continually having to investigate complaints that Gainesville is attempting to "pirate" the Coop's customers, competition for existing customers in areas in which there are duplicating facilities is not presently significant. Florida Power and Clay Electric do not directly compete with each other by reason of a workable service area agreement heretofore negotiated between them. Gainesville, however, does compete with Florida Power and Clay Electric for new customers in the suburban areas surrounding the city. Competition is not based on the difference in rates between the parties, but rather on services offered. Gainesville sells what would appear to be a "package deal" in that it will extend water and sewage facilities to customers in surrounding Alachua County only if such customer also commits himself to the purchase of Gainesville's electrical service even though Gainesville's rates for such customers average considerably higher than Florida Power's rates for like service.

A comparison of typical rates shows that Gainesville's minimum bill for retail customers is 30.8 percent higher than Florida Power's rate and corespondingly higher for customers using less than an average of 600 kwh per month, while Gainesville rates for commercial customers, averaging 375 kwh and 750 kwh per month are 49 percent and 53 percent higher respectively than the Company's rates.

Florida Power has heretofore attempted to meet this type of competition by providing financial assistance to

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[3] Florida Power's motion to reopen this proceeding in order to place in the record the facts concerning this further extension of Gainesville's distribution lines and the purchase by Gainesville of a water company previously financed by Florida Power was denied. However, these facts were not denied by Gainesville in its response to the motion.

Westward Utilities, Inc., a privately owned water and sewage company that operates in suburban Gainesville unincorporated areas of Alachua County. Such assistance consisted of outright grants totaling $50,000 and a series of mortgage loans since 1964 in an amount in excess of $430,000 with interest at six percent to commence on January 1, 1967. However, no interest payments have been made nor has Florida Power exercised its right to foreclose under the mortgage. Gainesville, since the close of the record in this proceeding, has countered this move by a direct purchase of Westward Utilities and has made repayment of the outstanding loans to Florida Power.[4]

Excluding those duplicating lines constructed by Gainesville since closing the record, the aforementioned 16.2 miles of duplicating lines and facilities represent an investment of approximately $165,000 plus annual fixed costs, operation and maintenance expenses of $16,550.

Gainesville's proposal envisions the establishment of a physical connection with Florida Power's 230-kv line at the Company's Archer substation, the installation of a 230/115 kv step-down transformer with a capacity of 36/60 mva and the construction of seven miles of single circuit 115 kv line to the switchyard of its planned transmission loop at a total estimated cost of $1,503,100. It is intended that the interconnection be closed at all times except when opening is required for safety, maintenance or repairs.

Interconnection among neighboring utilities, both investor and publicly owned, has become a "way of life." It is now axiomatic that there are mutual practical and economic benefits to be derived therefrom. Where, however, there is considerable disparity in the size of the systems involved there is a perhaps understandable indisposition on the part of the larger system to connect with the smaller because the benefits devolving to the smaller system as a result of the connection, as a general rule, far outweigh the advantages, if any, gained by the larger in the absence of any arrangement, financial or otherwise, between the parties to make up for the difference. In the ordinary case the parties are able to negotiate a workable agreement whereby they are able to "live" with each other. Unfortunately, in the instant case, protracted negotiations and innumerable conferences between Gainesville and Florida Power prior to institution of this proceeding have proven fruitless. Gainesville therefore resorts to Section 202(b) of the Act in order to accomplish by direction of the Commission what the parties have been unable to attain by negotiation. Additional conferences during, and even after, the close of the record have similarly yielded no result.

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[4] See fn. 3, *supra.*

It is the continued and considered opinion of the Presiding Examiner that the principal and real point of difference between the parties, namely, the territorial issue, is singularly amenable to negotiation and that the parties themselves could achieve by a compromise a more sanguine solution of the problem than by resort to the Commission. In the absence of any agreement to date, however, despite the perforce limited persuasive efforts of the Presiding Examiner to effect a settlement during the course of this proceeding, it devolves upon the Commission to seek a solution which will best serve the public interest.

Witnesses for Gainesville, Florida Power and Staff are in agreement that the proposed interconnection is desirable and in the public interest. The testimony shows that the interconnection will make available to Gainesville instantaneous emergency electric service across a closed connection by governor action with a loss in frequency of less than one-half cycle per second, thus providing Gainesville with spinning reserve[5] in the quantity it requires, which it could not otherwise provide by itself to prevent curtailment of load. If Gainesville were to maintain its isolated status it would be required to install duplicating additional generation of its own in order to assure its customers of firm service, although not without some curtailment because of reduction in frequency in the event of loss of its largest unit. Independent maintenance of sufficient installed capacity[6] to carry peak-hour load in the event of an outage, to the extent of the loss of Gainesville's largest unit, would surfeit the area with capacity far in excess of the amount necessary at any one time, an obviously wasteful and uneconomic process.

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[5] Generating capacity connected to the bus and ready to take load; capacity available in units operating at less than top capability.

The Company points out that Gainesville's "Ten-Year Master Plan" of September 1965 anticipates the installation of a 44-mw generator in 1970 with another scheduled for 1973, and that additional generation must therefore be acquired by 1970 for Gainesville to remain firm. Given the interconnection Gainesville will be able to defer installation of the additional capacity until 1972 or 1973 and thereby eliminate the 44-mw unit scheduled for 1970 by reduction of its installed reserve with a resultant annual net savings to Gainesville by reason thereof of approximately $300,000. Without the interconnection Gainesville would be required to constantly operate both its 44-mw and its 22-mw units if it is to maintain reliability of service. Gainesville's 44-mw unit carries the base load. The 22-mw unit is used to carry load swings and for spinning reserve in the event of an outage of its 44-mw unit. Thus to protect against the loss of the 44-mw unit Gainesville must bring its 16.5 mw on the line if loading on the 44-mw unit exceeds the maximum dependable output of the 22-mw unit. With instantaneous emergency service constantly available from Florida Power equal to the loading on Gainesville's 44-mw unit, Gainesville will be spared the necessity and the accompanying expense of operating its 22-mw and 16.5-mw units. Gainesville thereby also gains considerably more reliability of bulk power supply by acquisition of a second power source and could coordinate its automatic load shedding equipment with Florida Power for stabilization of frequency on the interconnected system in the event of an emergency.

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[6] Generating capacity in excess of peak-hour load to cover contingences.

While there is concurrence that the benefits to Gainesville as a result of the interconnection are substantial, there is considerable disagreement with respect to the advantages, if any, gained thereby by the Company. Florida Powed flatly states that it neither needs nor wants emergency electric service from Gainesville. The Company points out that it has emergency power instantaneously available on its own system, or from systems with which it has a mutual support arrangement, which enable it to withstand outages of more than 400 mw without loss of service to its customers; that the instantaneous emergency energy available from Gainesville's three largest generators, which would at best not exceed 6 mw, 3 mw and 2.5 mw, is too insignificant to be of value to Florida Power in the planning and operation of its system in that the spinning reserve which Gainesville can supply is less than the hour to hour deviations between Florida Power's actual and scheduled production, and less than the 30 to 40-mw margin of error which the Company allows in making its spinning reserve calculations.

Gainesville's witness, applying the ready reserve formula of the Florida Operating Committee, calculates that Gainesville will be in a position to supply Florida Power and the members of the Florida Operating Committee with increased firm sales capacity estimated at 13 mw to 18.8 mw with a corresponding reduction in installed reserve. For the purpose of showing that the interconnection will impose no additional burden on Florida Power, Staff's witness makes a similar calculation with respect to the obligations of Florida Power and Gainesville as a member and alternately, as a satellite to Florida Power, but does not go so far as to conclude that Florida Power's installed reserve could be diminished by that amount.

There is little purpose to any extended discussion herein with respect to which of the parties would acquire the greater benefit from the proposed interconnection. It is not the balance of benefits which determines whether the Commission should direct that there be an interconnection but rather whether such interconnection, as stated in Section 202(b), is "necessary or appropriate in the public interest * * *". From the record in this case it is clear that the proposed interconnection will serve the public interest and the fact of the matter is that such interconnection, in and of itself, has generated no opposition.

The difficulty arises, however, with respect to the conditions which should be attached to the order directing the interconnection. Florida Power has indicated on the record its willingness to interconnect with Gainesville provided (1) that Gainesville enter into an exclusive territorial agreement with Florida Power covering retail service outside the City limits; (2) that Gainesville be required to maintain installed reserve capacity equal to 125 percent of peak customer load; and (3) that Florida Power be paid a demand charge of $3.08 per kw per year for the instantaneous emergency electric services which it will supply to Gainesville equal to the megawatt capacity of Gainesville's largest unit.

The lack of agreement in connection with territorial service limitations is the principal obstacle to a negotiated settlement of this entire matter. As hereinbefore delineated, prior to the close of this hearing Gainesville constructed some 16.2 miles of primary distribution lines which duplicate previously erected lines of Florida Power and Clay Electric in the suburban areas. As demonstrated by Exhibits Nos. 15, 16 and 17, their respective poles are in some areas within a very few feet of each other and aside from economic considerations, are close enough to constitute an obviously hazardous situation. Gainesville offers little justification in the record for expansion of its electric service into the area outside the city limits other than a statement in its brief that "Gainesville has extended its lines through the suburban areas claimed by Clay and Florida Power, generally in response to requests for service * * *" but it is readily apparent from the record that such "requests for service" were, and Gainesville readily admits will continue to be, tinged with coercion in that those customers desiring Gainesville's water and sewage service were required to purchase the whole "package" even though Gainesville's rates for the same electric service were higher than Florida Power's.

Gainesville points out that Florida Power also maintains duplicating distribution lines in that it serves the University of Florida and an ice plant both of which are within the City limits and which could be served by the City. The facts with relation to the University show that the City supplied electrical service to the University from time of origin in 1905 to 1930. From 1930 to 1935 Florida Power supplied this service and from October 1935 to December 30, 1948, service was again supplied by Gainesville. Because of the considerable expansion of the University following World War II and the rapid growth of load in the Gainesville area, Gainesville requested the University to acquire electrical service from another source. Negotiations between the City, the University and Florida Power resulted in the construction of a 69 kv tap line to a new 1500 kva substation on the University campus. Further expansion of the University since that time necessitated the construction of additional facilities to the point where Florida Power's total direct investment in facilities which serve the University is now about one-half million dollars, exclusive of the cost of generation and transmission facilities. Thus considering this large capital investment in service facilities, occasioned in substantial part by Gainesville's request in 1948 that the University seek another source of supply, it is understandable and reasonable that the Company would seek to maintain the University as its customer despite the active competition of the City in recent years to recoup the University as a customer.

Perhaps the best reason for Gainesville's aggressive expansion is found in the fact that Gainesville's electrical system has proved to be a prime source of revenue which is used to defray other costs of City government.[7] The record shows that since 1955 electric revenues have contributed from earned surplus an average of 24 percent per year of the total cost of City government. Electric revenues have steadily increased to the point where the yield for the fiscal year ended September 30, 1966, was $947,985 or 22 percent of the total City budget of $4,310,514. The City's Ten-Year Master Plan anticipates that electric revenue contribution will be $2,203,872 in 1970 and $4,244,340 in 1974.

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[7] There are schools of thought which believe that it would be more equitable to apply such revenue to rate reduction.

That this type of competition combined with duplication of plant and facilities is an uneconomic and wasteful practice and therefore contrary to the public interest is at this stage of the game too elementary a proposition to require much by way of proof. It is generally recognized that there is a need for regulation in order to avoid the almost certain chaos and detriment to the public interest which would ensue if utility companies were permitted to compete directly with each other within the same areas and construct and maintain duplicating plants, transmission and distribution facilities.[8] It is for this reason that state utility commissions generally have authority to assign service territories, at least insofar as investor owned electric utilities are concerned,[9] and those utilities to whom exclusive franchises are granted thus become regulated monopolies, a status long recognized as being in the public interest.

In the instant case the problem arises from the fact that the Florida Public Utility Commission has jurisdiction to regulate investor owned utilities and, *inter alia,* assign service areas, but has no similar jurisdiction over municipally owned utilities. Gainesville is therefore in a position to extend its distribution lines clear across the state, should it so desire and compete directly with any utility, privately or publicly owned, with whose lines it is in proximity. No reason appears in the testimony or in the briefs, nor is any legislative history cited as to the intended purpose, if any, for this apparent omission in the Florida statute and, in the absence thereof, for the purposes of this decision it is unnecessary to do more than to take cognizance of the fact that Gainesville is free from both state and federal regulation.

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[8] National Power Survey, Part I, p. 13.

[9] Some states have conferred jurisdiction on State Utility Commissions to assign service territories to municipals and cooperatives.

The Federal Power Commission, under the circumstances of this case has jurisdiction under Section 202(b) to direct Florida Power to interconnect with Gainesville, *California Electric Power Co. v. F.P.C.*, 199 F. 2d 206, 208, 209 (C. A. 9-1952), cert. den. 345 U.S. 934 (1953), a power not enjoyed by the state, *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498 (1942); *cf F.P.C. v. Southern Cal. Edison Co.*, 376 U.S. 205 (1964). Such jurisdiction does not, however, extend to fixing territorial service limitations for either Florida Power or Gainesville.[10] But this Commission must do more than merely direct the interconnection in a vacuum without regard for the consequences as argued by Gainesville. It is required by the statute to specifically find, as a prerequisite, that such interconnection is "necessary or appropriate in the public interest."

The record amply supports a finding that the proposed interconnection would be mutually beneficial; and, for the purposes of this proceeding, whether more to one of the parties than the other is irrelevant. It is the benefit to the public as a whole with which this Commission is concerned.

From Gainesville's unequivocally stated intention to expand its electrical system and extend its distribution lines without regard to existing facilities, it follows that issuance of an unqualified order by the Commission directing the interconnection will inevitably result in the further uneconomic duplication of facilities,[11] a situation long recognized as inimical to the public interest. Such an order, moreover, would put Florida Power in the anomalous position where it will be furnishing the means for

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[10] It was the specific intent of Congress to limit FPC jurisdiction to interstate commerce and not to extend such jurisdiction to matters which it felt should be regulated by the state.

[11] Tr. 1637, 1638. The City's "Ten-Year Master Plan" also projects that by 1974 there will be an increase in the number of electric customers of whom 7270 will be outside the city and most of whom are presently served by Florida Power and Clay Electric.

Gainesville to compete against it more effectively within its own assigned service territory. Under these circumstances Florida Power would be contributing to its own economic erosion because of the adverse effect of such increased competition on its capital investment in the area.

Dr. Gladys Kammerer, a professor of political science and Director, Public Administration Clearing Service of the University of Florida, with apparent long experience in urban affairs, called as a witness for Gainesville, agrees with the adverse effect which the duplication of facilities has on the public interest and also suggested a solution. On cross-examination she stated:

> * * * I don't believe there has to be duplication in the urban area. In fact, it seems to me that duplication is very bad, and I would assume that the two parties, the city on the one hand — the three parties, the city, on the one hand, and the Florida Power Corporation, and the Clay Cooperative Company, all get together as reasonable people and the city as it extends its whole package of services to the urban area could agree on a fair price for the city to buy out the distribution system there * * *

When asked by the Presiding Examiner what the prognosis should be in the event the parties were unable to reach agreement, Dr. Kammerer responded:

> Well, this is a supposition that is possible. I would also make the supposition that human beings are reasonable, and that bargaining is a part of our whole democratic process.

She then suggested:

> I recommend that the Federal Power Commission suggest to the parties of interest that they do negotiate as individuals and corporations of reasonable public interest.

and further observed:

> I never yet heard of a group outside of the United Nations who can't get together to bargain across the

table, particularly if they are advised by any agency as significant as the Federal Power Commission.

The Presiding Examiner with full awareness of the numerous and, to date, fruitless attempts by the parties to resolve their differences nevertheless agrees with Dr. Kammerer that negotiation is the key to the situation as it presently stands whether, as suggested by Dr. Kammerer, achieved by Gainesville buying out Florida Power's facilities in the areas presently served by Florida Power and which Gainesville now wishes to serve, or by agreement which will delineate the areas to be served by each, or in fact on the basis of any other reasonable terms and conditions. The fact is that under the circumstances the parties must recognize that a mutually satisfactory solution can only be attained by the exercise of some give and take on both sides. As hereinbefore discussed the Commission cannot and should not order the requested interconnection without regard for the consequences regardless of the fact that such interconnection may, in and of itself, be in the public interest.

Accordingly, Florida Power is directed to interconnect with Gainesville on terms and conditions as hereinafter described, provided an agreement is first reached between the parties whereby the further duplication of facilities will be avoided. Any claim by Gainesville that such a condition will place Florida Power in a more favorable bargaining position would be inconsistent with Gainesville's contention that the advantages to be gained by Florida Power as a result of the interconnection are as great if not greater than the advantages thereby acquired by Gainesville. It would be well to emphasize at this point that contracts for the sale of power at wholesale containing provisions designating service areas have been negotiated between Florida Power and the Cities of Bushnell, Ft. Meade, Leesburg, Mount Dora, Lake Helen, Bortow, Williston and Orlando.[12]

For the instantaneous emergency electric service which Gainesville will acquire by means of the interconnection

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[12] Florida Power Corporation, Rate Schedule FPC Nos. 43 through 48.

Florida Power proposes that it be paid a "fair and reasonable" demand charge of $3.08 per kw per year equal to the capacity of Gainesville's largest unit. This would amount to an annual payment of about $150,000 as related to the capability of Gainesville's largest generator.

Gainesville, however, vigorously opposes the imposition of any charge whatsoever, contending that emergency backup service to Gainesville is not the only purpose of the interconnection. Gainesville sees the interconnection as a two way street whereby the parties will make available to each other, in time of emergency, power supply capabilities in excess of their own load requirements and firm supply obligations to others. Gainesville further points out, that to make this possible it is bearing the total cost of construction of the line to the point of connection between the two systems.

Whether the sole purpose of the interconnection is to supply instantaneous emergency backup service to Gainesville as contended by Florida Power or whether the interconnection will operate to the mutual benefit of the parties as viewed by Gainesville, the fact of the matter is that, aside from the financial and economic effect, if any, on Florida Power's rate payers, the Company, in order to provide Gainesville with the emergency backup power which it needs, as hereinbefore discussed, will at all times operate its system so as to have spinning capacity equal to the size of Gainesville's largest unit instantaneously available for delivery to Gainesville from any point on its system via its own transmission network; will relieve Gainesville of the burden of carrying spinning reserve on its own system; will by reason of the above effect investment and operating saving to Gainesville in excess of $300,000 per year after paying the full cost of the interconnection; and will give Gainesville's system a reliability of bulk power supply which it could not previously achieve in that it will be able to withstand a loss of generation up to 75 mw without interruption of service.

Florida Power, of course, discounts the advantages it will receive by reason of the interconnection and the Presiding

Examiner is inclined to agree that Gainesville will derive more practical benefit from the interconnection than will Florida Power. Gainesville could avoid expensive automatic control equipment by permitting Florida Power to provide frequency regulation. It could also reduce its operating expenses by block loading its generators whereby Florida Power would be carrying load swings, and during certain periods, spinning reserves for the Gainesville system. For example, during a 24 hour period, Gainesville could generate sufficient energy to meet its own loads for the period as a whole, but during valley period hours it would be importing energy over its interconnection with Florida Power. Also, during peak period hours, it could to some limited extent be exporting energy to Florida Power over its interconnection. If such block loading were to be utilized in an effective manner, both parties could receive operating benefits.

It is an inescapable fact, regardless of who is more favored, that the interconnection is more necessary to Gainesville than to Florida Power, if for no other reason than that Florida Power will not increase its operating expenses or capital investment to any appreciable extent with or without the interconnection, whereas without the interconnection Gainesville will be obliged to do so on both counts.

Keeping in mind that it is the public interest which decides whether there should be an interconnection and not the relative advantages to be gained by the parties to be connected, it is still necessary that there be some arrangement whereby services rendered in excess of services received can be compensated. To effect the interconnection on an equitable basis, it is accordingly directed that Gainesville and Florida Power shall provide emergency assistance to each other over the proposed interconnection to the full extent of their ability to do so. Energy provided by each party to the other during time of emergency shall be deemed an inadvertent flow and shall be returned in kind, but for emergencies in excess of one hour, the party incurring the emergency shall compensate the other party for incremental fuel and operating expenses plus 10 percent, commencing after the first hour.

In lieu of imposing any set demand charges, it is further proposed by the Presiding Examiner that the total operating benefits in dollars, received by each party by reason of the interconnection, be computed based on the respective estimates of savings to each, and payment of 50 percent of the difference be made by the party receiving the greater benefit by reason thereof to the party less advantaged (50 percent of the difference between the total savings to Gainesville less the total saving to Florida Power, or vice versa). It is suggested that under the method herein proposed suitable criteria for computing the respective benefits received can be devised by the parties themselves or submitted to this Commission for resolution if the parties so prefer, or fail to agree.

As a further condition to the interconnection Florida Power proposes that Gainesville be required to maintain on its own system an installed reserve capacity of at least 125 percent of its peak load. Florida Power contends that installed reserve in this amount is necessary to assure that Gainesville will materially contribute to its own support and not depend entirely on Florida Power for an extended period of time in the event of a sustained outage of Gainesville's largest unit. Staff recommends that Gainesville be required to maintain installed reserve capacity equal to 115 percent of its annual peak hour demand. Gainesville concurs in and agrees to accept this figure.

Florida Power's suggested figure of 125 percent is a judgment figure based on the opinion of its witnesses Hebb and Woodson who testified that this amount is necessary because Gainesville's largest unit constitutes such a high percentage of its summer long duration peak load. Hebb further testified that the installed reserve capacity for large interconnected systems "prevails at about 15 percent to 20 percent." Staff's proposal of a minimum reserve of 15 percent, on the other hand, is based upon a documented survey of capacity reserves actually installed and planned by members of the Florida Operating Committee for the 1961-1969 period, and upon studies relating to the specific characteristics of the Florida Power and Gainesville systems such as load characteristics, capacity of generation, size of individual generating units, forced outage rates and scheduled maintenance requirements.

On the basis thereof, the Presiding Examiner is persuaded that the figure recommended by Staff and concurred in by Gainesville will provide Florida Power with sufficient assurance that Gainesville will not unduly rely on or burden Florida Power in the event of an outage. As a matter of fact there is evidence which indicates that Gainesville's reserve capacity could be reduced to zero without increasing the Company's service risk level from what it would be without the interconnection.

In the event the block loading of generators hereinbefore suggested is adopted by the parties, Gainesville shall also be obligated to maintain spinning and ready reserves in accordance with the formula employed by the Florida Operating Committee; provided, that such spinning and ready reserve obligations shall at no time exceed 10 and 15 percent, respectively, of Gainesville's peak hour demand.

Staff takes issue with Gainesville's proposal for a 36 mva interconnection at Florida Power's Archer Substation and recommends, with concurrence by the Company, that Gainesville provide transmission facilities with a 60 mva transformer rating. Staff effectively demonstrates that by installing facilities of this capacity Gainesville would increase the extent of emergency assistance it could provide or receive by 66 percent at an increase in cost of $50,000, or only 3.3 percent of the total cost. This capacity, moreover, has been demonstrated to be commensurate with the capacity of the 115 kv transmission line leading to the Company's facilities. An interconnection with a capacity of 60 mva will therefore be directed.

There remains the matter of Florida Power's Motions to Dismiss. The first motion filed prior to the Answer is based on lack of jurisdiction because the City of Gainesville is not a "person" within the meaning of Section 202

(b) of the Act. The short answer to this contention is the recent opinion of the Commission in the case of *City of Paris, Kentucky v. Kentucky Utilities Co.*, Opinion No. 525, August 4, 1967, 38 FPC 269, wherein the Commission found "that the City of Paris, Kentucky, is a 'person' within the meaning of Section 202(b) of the Federal Power Act and is engaged in the transmission and sale of electric energy." The Motion is therefore denied.

Florida Power's Motion to Dismiss Gainesville's First Cause of Action under Section 202(b) for Lack of Jurisdiction and Failure of Proof; Motion to Dismiss Gainesville's Second Cause of Action under Sections 205 and 206 for Lack of Jurisdiction and Failure of Proof; and Motion to Dismiss Gainesville's Third Cause of Action under Section 10 of the Act for Lack of Jurisdiction and Failure of Proof are similarly denied. Insofar as Florida Power's claim that this Commission lacks jurisdiction to direct the interconnection is concerned the answer is also found in the *City of Paris* case, *supra*. Therein the Commission found that Kentucky Utilities Co. was a "public utility," (a status not denied by Florida Power) subject to the jurisdiction of the Commission and directed "The establishment of a physical connection between the transmission facilities of KU and Paris * * *." Florida Power's contentions with respect to failure of proof are similarly unwarranted for the reasons hereinbefore discussed at length. This Commission has also previously found that it has jurisdiction to consider unreasonable and discriminatory contracts for sales of interstate energy to wholesale customers within the meaning of Sections 205 and 206 of the Act, *Georgia Power Co.*, Opinion No. 487, March 30, 1966, 35 FPC 436; *Duke Power Co.*, 32 FPC 1253 (1964); and may consider whether the such contracts violate antitrust principles contrary to Section 10(h) of the Act. *Pacific Northwest Power Co.*, 31 FPC 247, 274, 275 (1964).

ADDITIONAL FINDINGS AND CONCLUSIONS

Upon consideration of the entire record in this proceeding, including the pleadings, the evidence adduced and the briefs filed, it has been found and concluded, in addition to the findings and conclusions heretofore stated that:

(1) Florida power is a "public utility" within the meaning of Section 201(a) of the Federal Power Act.

(2) Gainesville is a "person" within the meaning of Section 202(b) of the Federal Power Act.

(3) It is necessary and appropriate for the purposes of Section 202(b) of the Federal Power Act, that the Commission order Florida Power to establish physical connection of its transmission facilities with the facilities of Gainesville at the Archer substation location as set forth in Finding (4) below, to sell energy to and exchange energy with Gainesville upon the terms and conditions as ordered below provided, that the parties, in furtherance of the public interest shall prior thereto execute an agreement whereby the construction of duplicating facilities will be avoided. Such sale and exchange of energy will not place any undue burden upon Florida Power, nor require Florida Power to enlarge its generating facilities for such purpose, nor impair its ability to render adequate service to its customers.

(4) It is necessary and appropriate in the public interest that a physical connection be established on the transmission system of Florida Power at the location known as the Archer Substation on the Florida Power Suwannee-Silver Springs 240 kv transmission line. Such physical connection shall include the equipment necessary for a 240/115 kv transformation, in accordance with recognized engineering practice. Unless otherwise provided by written agreement of Florida Power and Gainesville, the facilities for such physical connection shall conform substantially with the facilities described in Exhibit 3. Gainesville shall provide or compensate Florida Power for providing the facilities necessary for a 60 mva interconnection at Florida Power's Archer Substation, and also shall provide a 115 kv transmission line and facilities for connecting same to the Gainesville system. The facilities shall be substantially as described in Exhibit 3, modified as necessary for a minimum of 60 mva capacity.

(5) Gainesville shall own, construct and service the 115 kv transmission line and its termination facilities on the Gainesville system. Construction, service and ownership of the physical interconnection facilities at the Archer substation shall be as agreed upon by the parties.

(6) Provided agreement is reached as specified in Finding (3) hereof, Florida Power and Gainesville shall proceed to construct the interconnection facilities referred to in Findings (4) and (5) above in the shortest reasonable time.

(7) The terms and conditions of the sale and exchange of electric energy following the effective date of the interconnection, and thereafter, unless and until modified by rate schedule filing completed in accordance with Part 35 of the Commission's Regulations under the Federal Power Act or modified by Commission order, shall be as follows, subject to modification by written agreement of the parties and acceptance by the Commission of such modification:

> (a) Installed Reserves: Gainesville shall own or provide generating capacity resources equal to or greater than 115 percent of Gainesville's estimated annual peak-hour demand. The estimated peak-hour demand for any year shall be that given for the calendar year in Schedule 19 of the latest FPC Form 12 Report filed by Gainesville with this Commission, unless otherwise agreed to in writing by the parties.
>
> (b) Economy Energy: If the parties engage in economy energy transactions, payment therefor shall be at the rate per kilowatt hour of one-half the sum of: the incremental cost of providing the energy from the seller's resources plus the incremental cost that would have been incurred by providing the energy from the buyer's resources.
>
> (c) Operating Reserves: Gainesville shall maintain spinning and ready reserves in accordance with procedures established by the Florida Operating Committee up to a limit of 15 percent of Gainesville's estimated annual peak-hour demand for ready reserves

and up to a limit of 10 percent of that demand for spinning reserves.

(d) Inadvertent Energy Transfers: Inadvertent transfers of energy shall be returned by the receiving party in an amount equal to that received and at comparable times, or shall be paid for as specified in paragraph 7(g) below.

(e) Emergency Electric Service. Emergency electric service provided for a period of less than 60 minutes shall be treated as Inadvertent Energy Transfer (see paragraph 7(d) above). Such service, if provided beyond the end of a 60 minute period shall be treated as Scheduled Electric Service (see paragraph 7(f) below).

(f) Scheduled Electric Service: To the extent of its ability to do so, each party shall provide power and energy to the other for scheduled maintenance of generating or other facilities. Payment shall be in accordance with paragraph 7(g) below.

(g) Payments: Except for payments related to Economy Energy transactions, described under paragraph 7(b) above, payments shall be as follows:

(1) Inadvertent energy, if not returned in kind, shall be paid for upon 30 days' notice given by the delivering party at the rate of 4 mills per kwh, or the seller's average fuel cost plus 10 percent of such cost, whichever is less at the point of interconnection.

(2) Scheduled Electric Service shall be paid for at the rate of $.08 per kw per day for each kw of actual or scheduled demand, whichever is greater, if paid for by Gainsville or whichever is smaller if paid for by Florida Power, plus 4 mills per kwh or the seller's average fuel cost plus 10 percent of such cost, whichever is less at the Archer Substation.

(3) The total operating benefits, in dollars, received by each party by reason of the interconnection shall be computed based on the respective estimates of savings to each and annual payment of 50 percent of the difference shall be made by the party receiving the greater benefit to the party less advantaged.

(8) Within 30 days from the date of agreement as set forth in Finding (3) hereof Florida Power shall submit to the Commission for consideration a proposed rate schedule reflecting the terms and conditions of the interconnection as set forth in the Findings above.

(9) Florida Power shall report to the Commission the date of commencement of service provided for herein within 30 days following the commencement of such service.

(10) This Commission's direction that Florida Power connect its facilities with those of Gainesville, as set forth in the Findings above, renders moot the allegations in Gainesville's complaint that Florida Power is violating Sections 205 and 206 of the Federal Power Act by interconnecting with other electric utility systems and discriminating against Gainesville by refusing to interconnect with Gainesville.

(11) The evidence of record in this proceeding does not establish violation by Florida Power of Section 10(h) of the Federal Power Act as alleged in Gainesville's Complaint.

ORDER

Wherefore, *It is ordered*, subject to review by the Commission:

(A) Gainesville and Florida Power shall commence negotiations immediately for the purpose of reaching an agreement whereby all duplication of facilities will be eliminated and avoided and pursuant to which Florida Power will sell and exchange energy with Gainesville. If no agreement is reached within 20 days after this order becomes the final order of the Commission, the Commission shall be so advised in writing by both parties, each party stating the reasons for failure to reach agreement.

(B) Provided agreement is reached as described in Paragraph A hereof Florida Power shall establish connection of its facilities with those of Gainesville as described in Finding (4), *supra,* this being necessary and appropriate in the public interest for the purposes of Section 202(b) of the Act.

(C) Florida Power shall notify this Commission when the interconnection ordered in Paragraph B hereof is established and operative.

Martin E. Rendelman,

Presiding Examiner.

(3) The total operating benefits, in dollars, received by each party by reason of the interconnection shall be computed based on the respective estimates of savings to each and annual payment of 50 percent of the difference shall be made by the party receiving the greater benefit to the party less advantaged.

(8) Within 30 days from the date of agreement as set forth in Finding (3) hereof Florida Power shall submit to the Commission for consideration a proposed rate schedule reflecting the terms and conditions of the interconnection as set forth in the Findings above.

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(11) The evidence of record in this proceeding does not establish violation by Florida Power of Section 10(h) of the Federal Power Act as alleged in Gainesville's Complaint.

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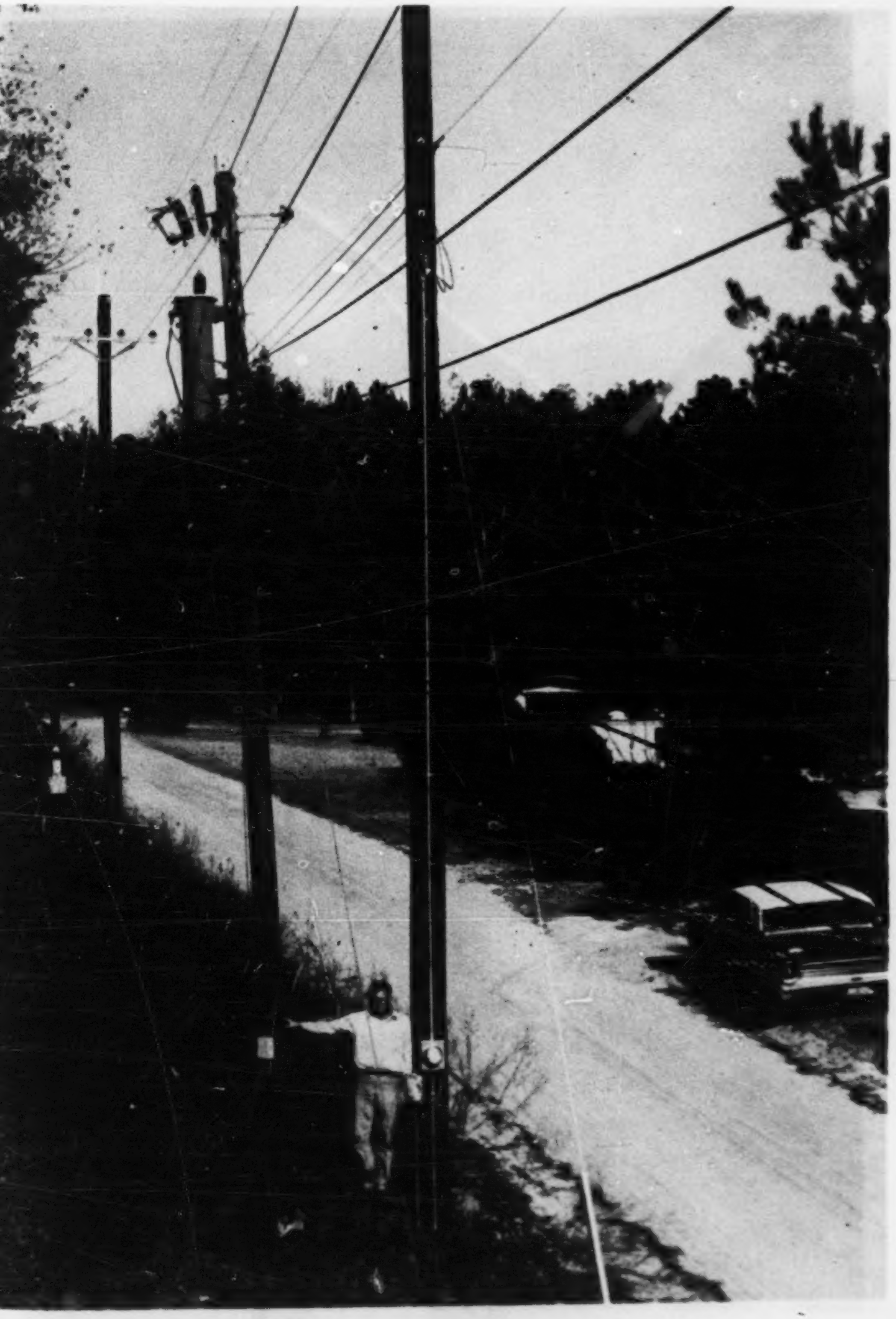
(A) Gainesville and Florida Power shall commence negotiations immediately for the purpose of reaching an agreement whereby all duplication of facilities will be eliminated and avoided and pursuant to which Florida Power will sell and exchange energy with Gainesville. If no agreement is reached within 20 days after this order becomes the final order of the Commission, the Commission shall be so advised in writing by both parties, each party stating the reasons for failure to reach agreement.

(B) Provided agreement is reached as described in Paragraph A hereof Florida Power shall establish connection of its facilities with those of Gainesville as described in Finding (4), *supra,* this being necessary and appropriate in the public interest for the purposes of Section 202(b) of the Act.

(C) Florida Power shall notify this Commission when the interconnection ordered in Paragraph B hereof is established and operative.

MARTIN E. RENDELMAN,

Presiding Examiner.



Florida Power Corporation Exhibit No. 16

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 652

FLORIDA POWER CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, by this cross-petition for a writ of certiorari, seeks review of the same lower court judgment involved in the pending petitions filed by the Gainsville Utilities Department (No. 464) and the Federal Power Commission (No. 469). This cross-petition, however, which presents an issue unrelated to the issue presented by the two earlier petitions,[1] is out of time. Moreover, the issue raised does not warrant consideration by this Court.

1. The judgment of the court below was entered on May 1, 1970. The only further action by the court involved a June 17 order modifying the judgment to eliminate the assessment of costs against the Com-

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[1] There were three main areas of controversy before the Commission: (1) the Commission's jurisdiction to order an

mission. As this modification did not affect the merits of the original judgment, the time for filing a petition for a writ of certiorari expired 90 days after the May 1 judgment unless extended by order of a Justice of this Court. 28 U.S.C. 2101(c); see *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.,* 344 U.S. 206, 211–212. As no extension was sought and the cross-petition herein was filed after expiration of the 90-day period, this Court is without jurisdiction to consider the cross-petition.

Petitioner's reliance (Pet. 2) upon *Brotherhood of Ry. & S.S. Clerks* v. *Florida East Coast Ry. Co.,* 382 U.S. 1008, 384 U.S. 239, 243, and *Pierson* v. *Ray,* 384 U.S. 938, 386 U.S. 547, 551, appears misplaced. In *Brotherhood,* Mr. Justice Black extended the time within which to file a cross-petition by amending, after the 90-day period had run, a timely extension previously granted to the petitioner to include the cross-petitioner, the order containing the notation "if within

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interconnection between the Florida Power Company and the City of Gainseville, (2) the appropriate terms of payment covering the interconnection and (3) the competition for new retail customers between Gainseville and Florida Power. The Commission's jurisdiction to order the interconnection was upheld below and is not challenged here. The terms upon which the Commission determined the interconnection was to take place were held to be improper by the court below, and that issue is now pending before this Court on the petitions by the Commission and by Gainseville. The instant cross-petition seeks review of the court of appeals' refusal to overturn the Commission's decision not to condition interconnection upon an elimination of competition between the two utilities.

my power to do so." Stern & Gressman, *Supreme Court Practice,* pp. 311–312 (4th ed. 1969). Although both the petition and cross-petition were subsequently granted, the Court did not discuss the timeliness issue. In *Pierson* v. *Ray,* this Court granted a cross-petition filed out of time for which no extension had been obtained. While again the Court did not focus on the jurisdictional issue (which was not raised), the issue raised in the cross-petition was closely related to—and indeed could reasonably be deemed subsumed in—the question presented by the timely petition. The instant cross-petition is clearly distinguishable as it presents an issue wholly independent of the issue raised in the original petitions.

3. There is no merit to the contention that the Commission erred in not conditioning interconnection between Florida Power and Gainseville upon the elimination of competition between the two utilities in certain suburban areas surrounding the City of Gainseville. Under Sections 201(a) and (b) of the Federal Power Act, 16 U.S.C. 824(a) and (b), jurisdiction over retail sales and distribution facilities is left to the states. While in an appropriate case the Commission might condition interconnection upon the parties' negotiation of an agreement upon territorial service restrictions to eliminate duplication of distribution facilities, the determination of what constitutes such an "appropriate case" lies within the discretion of the Commission. In this case, the Commission concluded

that the competition between the two utilities was not of major importance and did not impose an undue burden upon Florida Power (Pet. App. B, 31a). In view of the likely difficulty the parties would have in reaching agreement on the issue, the Commission was of the opinion that the conditioning of interconnection upon such an agreement would unduly delay the consummation of interconnection, which the Commission had found to be in the public interest (Pet. App. B, p. 32a).

The Commission clearly did not abuse its discretion in denying Florida Power the relief from competition it requested and the court below, in upholding the Commission on this point, correctly found that the issue "is not directly related to this case." (Pet. App. A, p. 1a, n. 1).

It is therefore respectfully submitted that the cross-petition for a writ of certiorari should be denied.

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